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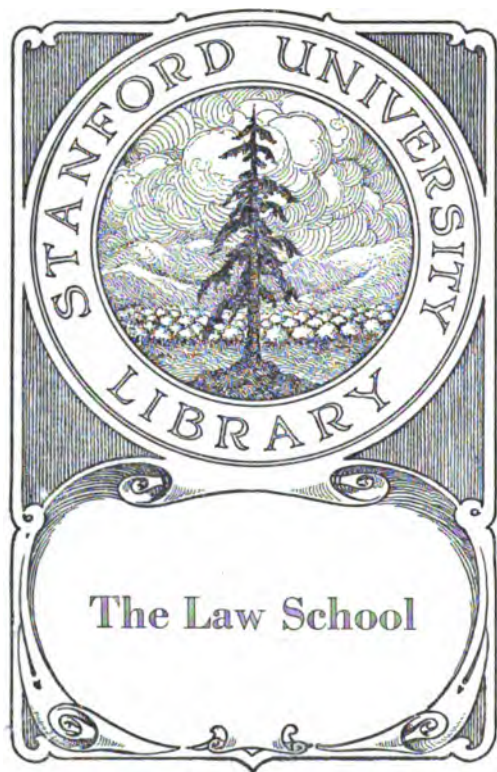
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THE
LAW OF PLEADING

IN

CIVIL ACTIONS AND DEFENSES
UNDER THE CODE

ALSO PRACTICE IN

STANFORD LIBRARY
APPEAL AND ERROR

WITH

NUMEROUS FORMS AND PRECEDENTS

(WITH SPECIAL REFERENCE TO THE OHIO CODE)

BY

EDGAR B. KINKEAD

OF THE COLUMBUS, OHIO, BAR

(*SECOND EDITION*)

VOLUME I

CINCINNATI

W. H. ANDERSON AND COMPANY

1903

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PREFACE TO SECOND EDITION.

In preparing the second revised edition of this work the entire text has been gone over and all new cases added. The first ten chapters, which were intended in the first edition to be a concise general treatment of the subject, have been almost entirely rewritten, and much new matter—sections and chapters—have been added. It covers the entire field of general principles of Pleading and Procedure, other than Trial Practice, in a complete, concise, and historical manner. It is not a mere compilation of principles and rules of pleading as deduced from the cases, but a philosophical treatment in many instances as well.

New matter has also been added in the chapters on special subjects, and the forms revised.

E. B. K.

COLUMBUS, OHIO,
August, 1898.

PREFACE TO FIRST EDITION.

In introducing this work the writer has no apology to offer, except that members of the bar have frequently suggested the need of a new book on pleading. The subject is one of the most important in the whole category of the law, and yet the actual preparation of pleadings is not always attended with that care and technical precision so essential.

In this age of experience and practice under the code, the profession generally being of the opinion that it is a model system in all respects, it is unnecessary to say anything in its behalf. It stands out as one of those great reforms peculiar to the American people. The memory of the late distinguished jurist so largely instrumental in the promulgation of the first code will live as long as the code system prevails, while its denunciation by those wedded to the old system is now forgotten. The principles of the common-law system were only moulded into simpler and more convenient form. No inconvenience has been experienced in the practical operation of the code system, except in the proper and more desirable mode of trial where legal and equitable causes of action have been united. The rules and principles were not materially modified. Changes, however, must always be made as time passes, and new principles of law must be formulated to keep pace with the rapid advancement of civilization, and old principles more clearly defined by later decisions. Hence new rules and principles of pleading must necessarily be established. This alone justifies a new work on pleading embodying the later adjudications on the subject.

In attempting to supply the needs of the profession, the writer has proceeded upon the theory that it is not so much the theoretical or individual discussion of principles of pleading that is desired as the close, careful and thorough collection of rules and principles deduced from decisions old and new, supported by authority, systematically and conveniently arranged for reliable, ready reference.

The writer has long entertained the opinion that in the present age the busy lawyer will disregard the personal views or theoretical discussion of a text-writer, unless the authority is cited upon which it is based, and is in fact the reasoning of courts. The different states have advanced in years, and have accumulated a mass of law, and the busy practitioner needs this briefly and logically collated. An author who does this is performing the true mission of his calling and rendering service to his profession. His duty is to formulate the law as disclosed from the chaos of cases, setting forth inaccuracies, pointing out conflicting rules and principles, not omitting personal discussion and opinion when necessary to accomplish this result.

Adopting this plan, the writer has endeavored to prepare this work for practical every-day use. It has been the aim to present in the first ten chapters all the general principles of pleading in actions and defenses under the code which are applicable alike to particular actions or subjects. In subsequent chapters the subjects have been taken up in alphabetical order, completing each subject in one chapter, believing this to be more convenient than to refer the reader to another portion of the book for any part of a subject. The eighty-two particular actions or subjects have been thus treated. In the text preceding the forms in the particular actions, the manner of pleading is pointed out.

The work is closed with two chapters on Appeal and Error, embracing the practice in appeal in all its phases and the

practice in error in all courts having jurisdiction in error. These subjects varying in different states, the treatment is largely confined to Ohio.

In many instances the region of pleading has been departed from, and general rules of law and rights of individuals outlined where it seemed advisable to an understanding of the correct mode of pleading in the particular case; and in the citation of authority throughout, all available sources have been explored, particularly of those states whose codes are similar. The decisions of courts of inferior jurisdiction are appropriately used because of the fact that many questions there decided do not go to the higher court.

The work is founded upon the Ohio Code, and its provisions, as well as statutes not strictly part of the Code, are freely inserted, though not always with verbal accuracy. In many instances it seemed more desirable to state the substance so long as the meaning was not mistaken or destroyed. While the book is based upon the Ohio Code, authorities have been cited from all code states, and the general rules and principles of pleading applicable in code states have been fully discussed throughout.

Great care has been taken in the collection of forms and precedents, the aim having been to avoid the beaten path of set forms as much as possible. To this end diligence has been exercised in obtaining forms from cases which have reached the court of last resort, from the reports, and from other cases, in many instances citing the case from which they were taken. Many members of the profession assert that they do not follow forms; yet they are frequently of assistance as a guide, and convenient to follow in a general way to aid in drafting pleadings. In some cases special allegations in forms have been separately indexed, thus seeking to make them more useful, as special averments may frequently be used when the whole form cannot.

The references in the index are to pages principally, unless the sectional reference is indicated by the character. This plan was adopted because of the length of many sections; but a preference for sectional references is the reason for the mode adopted.

Care has been exercised to detect errors in citations and other inaccuracies, but they may appear. Knowing that it is easier to tear down than to build, and that there is great opportunity to err in the citation of so large a number of cases, the examiner's indulgence is assumed.

Several gentlemen have rendered valuable assistance in the preparation of the work. Grateful acknowledgment is made to Paul Jones, Esq., of the Columbus, Ohio, bar for the chapter on Municipal Corporations; to W. G. Way, Esq., of the Marietta, Ohio, bar, for valuable assistance in the preparation of the chapter on Demurrer; and to Judge D. F. Pugh and Col. J. T. Holmes, of Columbus, Ohio, for advice and counsel during the progress of the work.

With these introductory remarks the work is submitted to the profession, with the earnest hope that the writer's efforts may, in a measure, be appreciated and found of value.

EDGAR B. KINKEAD.

COLUMBUS, OHIO,
October, 1894.

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LAW OF PLEADING.

INTRODUCTORY CHAPTER.

COMPARATIVE—HISTORICAL VIEW OF PLEADING.

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| <p>Sec. a. Importance of historical knowledge of pleading—The common law and code systems.</p> <p>b. A study of the development of the system of pleading.</p> <p>c. Study of development of pleading continued—Some of the causes leading to a change in pleading and procedure—Development of substantive law.</p> <p>d. Study of development of pleading continued—Early influence of equity upon common law procedure—Resulting in addition of new writs and forms of action.</p> <p>e. Study of development of pleading continued—The legal fictions.</p> | <p>Sec. f. Study of development of pleading continued—Separation between courts of law and equity.</p> <p>g. The forms of action.</p> <p>h. The form of pleading at common law.</p> <p>i. Common law form of pleading—Special pleading explained.</p> <p>j. Common law form of pleading—General pleading.</p> <p>k. The code form of statement of cause of action.</p> <p>l. Abuses in the present system.</p> <p>m. Pleading and procedure embraces what.</p> <p>n. Some historical facts with reference to codes.</p> <p>o. Advantages of a thorough knowledge of pleading and procedure.</p> |
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Sec. a. Importance of historical knowledge of pleading—The common-law and code systems.—No one can expect to gain an accurate knowledge of pleading without having first made a thorough and minute comparative historical study of the Old and the New procedure—the common law and the code. The knowledge to be thus gained is invaluable, and the process and results in this line of study resemble the rules of statutory construction. In construing a statute recourse must be had to the old statute, and the objects sought to be attained by the amended one. And so with the construction of a statute which abrogates or

modifies common-law rules, recourse must be had to the common law and a comparison made in order to ascertain the meaning of the statute. Our codes either repudiate or modify the common-law procedure. We are able to better understand the code when, by a comparison between the common law and the code, the object of the change is made apparent. Again, a study of the common-law system is necessary because we have not abrogated all of the rules prevailing thereunder. This course of study is not alone necessary and beneficial to the student, but knowledge of the principles thus acquired should be a familiar book to the well-educated practitioner. The lawyer who has thoroughly mastered the two systems of procedure will constantly find it of great practical advantage to him. A lawyer who is thoroughly familiar with the code, and who appreciates its spirit, must certainly recognize the reason and logic of the common-law system. The eminent jurist, Judge Cooley, said: "After a trial of the code system for many years its friends must confess that there is something more than mere form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately as to leave his rights in doubt on his own showing. Let the common-law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road."

Sec. b. A study of the development of the system of pleading.—A study of the development of the system of pleading and procedure is most interesting and instructive, and should not be neglected by anyone. The changes made from time to time in the history of the subject were made necessary by the development of substantive law which advanced to keep pace with the rapid strides of an enlightened civilization. Substantive law had to grow to keep up with the times, and if it could not be improved and moulded into new form, or if new principles could not be established, through the forms of procedure in existence at the time, then it became necessary to repair the machinery of legal procedure.

Sec. c. Study of development of pleading continued—Some of the causes leading to a change in pleading and procedure—Development of substantive law.—One of the first causes which we may say led to the change from the common law to the code was the inability of the old system of procedure to keep pace with the development of substantive law. The principles which ought to have been applied to the new things as they arose with the progress of civilization could not be enunciated because the machinery of the law was so far behind or out of date or inadequate, that the rights of parties could not find their way into court. In the early common law, if one suffered an injury indirectly from a trespass, there was no remedy because there was no form of action adapted to remedy such a wrong. So the now very important branch of substantive law known as Non-Contract Law, or the Law of Implied Contracts, remained undeveloped until by the influences of equity the common-law procedure was repaired by the addition of the action of assumpsit.

Sec. d. Study of development of pleading continued—Early influence of equity upon common-law procedure—Resulting in addition of new writs and forms of action.—The ancient common-law actions were real and personal, the latter consisting only of Debt, Covenant, Trespass, Detinue and Replevin. These were very inadequate; no action could be brought upon a contract unless it was under seal, or unless it created a debt of a certain amount. There could be no redress for a wrong against person or property unless it was accompanied with violence remedied in the action of trespass.

Thereupon an act of Parliament was passed which authorized the Chancery Clerks to invent new forms of writs to meet new conditions of fact, so that rights could be remedied that were without any means of redress. This resulted in the creation of the Actions of Case, Trover and Assumpsit. This reform was brought about through the influence of equity, and the new actions were far-reaching in their effect.

Sec. e. Study of development of pleading continued—The legal fictions.—The legal fictions of the common-law actions so contrary to reason, was another objection to the common law and reason for a change. We can not object to the fiction of the implied promise in assumpsit as the fiction of the implied promise is still retained in the law of contract and in non-contract law. But we see no good reason for having an action of assumpsit for unsealed instruments, nor an action of covenant for sealed instruments. And the fiction that a person has lost goods and

another has found them and converted them to his own use—necessary to sustain trover, is repugnant to logic. Still worse was the use of fictions in the action of ejectment, where the entry, the lease, the ouster, the nominal plaintiff, and the nominal defendant were all feigned.¹ The actions, some of them required a great deal of formality, falsehood and fiction in the statement of the case. It was necessary to state a falsehood in order to recover. These fictions were discarded when the forms of action were abolished.²

Sec. f. Study of development of pleading continued—Separation between courts of law and equity.—One of the chief objections to the old procedure was the existence of separate and distinct courts for the administration of law and equity. The very nature of equity would seem to show that it was never intended to have two separate and independent systems of procedure. Equity, as we are well aware, arose on account of the defects of the common law. "It is not an original, independent system, but amendatory and corrective of an old one." The only inconvenience experienced by having two forms of procedure in two courts was on account of form alone, and not because of substance. If a wrong form of action was adopted the error was fatal, however clearly the facts stated would entitle the party to some redress. If the facts stated in the declaration would have entitled the plaintiff to equitable relief but his action was instituted in a court of law, it was fatal; he could not then as now have whatever relief he is entitled to without regard to the form of the action or the prayer, but had to begin a new action in a different court. Under the present procedure if plaintiff shows facts sufficient to entitle him to relief, either legal or equitable, he can have it without regard to the form of his action as shown by his prayer. The prayer in such case will be disregarded and the appropriate relief granted. This may readily be done because the facts are stated and the same court may administer law and equity as the case may require.

Still another very serious objection to the old system was that it so frequently required more than one suit to settle controversies between parties, which might just as well have been settled in one. A legal defense could not be interposed to an equitable action, nor an equitable defense to a legal action, but the legal or equitable action must proceed to final termination, and the party with the legal or equitable defense had to resort to an independent

¹ Hepburn, *Devel. of Plg.*, sec. 25.

² R. S., sec. 4973. See full discussion of Fictions in Hepburn's *Hist. Devel. of the Code*, secs. 26, 27.

suit in another court in order to establish his claim, which might just as well and better have been established in the one suit. The unison of the two systems into one, enabling a defendant to set up as many defenses as he may have, whether legal or equitable, avoided a multiplicity of suits, saved costs and trouble to litigants.

The change made was only of form, the distinction between law and equity remaining as it was, but both to be administered by one court. The walls separating the two jurisdictions were merely broken down and the two systems simplified and moulded into one. I can not agree with the eminent author who says that if the "fundamental principle introduced by the codes be honestly followed to its logical results, if its spirit be faithfully accepted as the true and only guide in the work of constructing a system of practical rules for the bench and bar, there should be no such distinctive names used in legal terminology as 'legal action' and 'equitable action,' certainly no 'action at law' or 'suit in equity,' since with strict accuracy of expression no action can be considered in itself as either legal or equitable."¹

The distinction between law and equity is as immutable as the hills and rocks, the only change being that they are administered through the same channel. The language of the Ohio Code Commissioners' report more clearly expresses what was done; it is given in the note.²

¹ Pomeroy's Code Rem., sec. 36.

² "It is not meant to do more than abolish the distinction between actions at law and suits in equity. It is not meant to impair or affect rights, as heretofore recognized, or to lessen the extent of relief heretofore granted, but to grant just as much as before, only requiring that all relief, legal and equitable, formerly sought by the various actions at law and suits in equity, shall hereafter be sought by commencing every suit for it in the same way. The entire mass of remedial justice, all that portion of it which has been administered in courts of law, and all that portion of it which has been administered in courts of chancery will remain, but be administered by a different mode of procedure. The common law will be as then, and so of equity. They will continue to

stand to each other in the same relations, and their peculiar relief will be invoked in the same cases as before. In a word, the proposition to abolish the distinction between actions at law and suits in equity does not affect the principles of law and equity, and only changes a part of the machine heretofore used in administering them." Code Com. Rep. 7, 8. See Pomeroy's Code Rem., sec. 108 and notes. In a recent case, *Ingraham, J., in Taplitz v. Bauer*, 49 N. Y. S. 840, said: "Since the consolidation of the courts of equity and law in one court the distinction between actions in equity and actions at law has been uniformly maintained, and, although both actions are tried in the same court, the methods of trial are as distinct as before the consolidation."

Whether a case is one in equity or at law does not depend upon the understanding of parties or of the trial court, nor even upon the form of the judgment rendered, but upon the nature of the action as shown by the pleadings.¹

Sec. g. The forms of action.—When the code was enacted there were in Ohio ten actions at law and one for chancery cases. Each action had its own form of declaration, differing from every other in the commencement, in the conclusion, and in the allegations throughout.² One form—the civil action—was substituted for all these. It has been declared that all the old actions still exist in substance, with simply the loss of their names. It is the author's opinion that this is very largely true. The rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the code.³

The names of some of the old actions, if we are thoroughly familiar with them, more aptly express our ideas of the form or kind of action in question, but when we use the name we have reference only to the cause of action and the rights and liabilities of the parties as they now exist.

For example, if the action be upon an implied contract, instead of saying that it is an action upon an implied contract, we may say that it is an action of *assumpsit*, having in mind the idea that that action was the form of action used at common law to remedy the wrong complained of, but the form of the action is not really in existence. So we may use the action of trespass and case in the same manner, as more nearly expressing our conception of the action.⁴

Under the Code it is not necessary to designate an action by any particular name. It is not essential that the action be denominated an action at law or equity. It is only necessary to state the facts which constitute the cause of action, and the necessary relief will be granted.⁵

Sec. h. The form of pleading at common law.—Another objection to the common-law system of procedure was its peculiar manner of pleading. There was on account of the various fic-

¹ Raymond v. R. R. Co., 57 O. S. 271.

² Code Com. Rep., 4, 5.

³ Dixon v. Caldwell, 15 O. S., 415.

⁴ See discussion in Pomeroy's Code Rem., sec. 38. It would be instructive and interesting to read the com-

ments of the Code Commissioners upon the question of abolishing the forms of action. Code Com. Rep., pp. 3, 4.

⁵ Alter v. Bank, 73 N. W. Rep., 667 (Neb., 1897).

tions, already discussed, "a great deal of formality, falsehood, and fiction in the statement of the case, technically called the pleadings. Each one has its own form of declaration, differing from every other in the commencement, in the conclusion, and in the allegations throughout; and many of them so abound in form, fiction, and falsehood, as to render it impracticable for a party to make a plain and simple statement of his case."¹

There existed at common law two kinds of pleading, one special and the other general. It is well that one should understand those two ways of pleading, in order to appreciate the change. And it is well that one should thoroughly appreciate the spirit of the code, and the evils of the former system of pleading so as to avoid complications and abuses in the new system resembling the old system. This manner of pleading almost utterly failed to accomplish the primary objects of pleading, namely, to present the facts in dispute to enable the court to pronounce the law, and in such a manner as will readily disclose the points at issue. The objections to the old common-law system of pleading were because of the fact that the lawyers themselves were responsible for its degenerated condition brought about by their abuses. Special pleading, more nearly a *fact* system, ought to have been all right, but general pleading ought never to have been tolerated.

Sec. i. Common-law form of pleading—Special pleading explained.—We may look in vain for a satisfactory explanation of Special Pleading. It was the fact system in contrast with general pleading. It consisted in stating the facts constituting the cause of action with such verbosity, formality, falsehood and fiction, as to conceal and render the issues obscure to court and jury. Adroit word-spinners vied with each other in their efforts in this direction.² The fault then was not with the system itself, but arose from the habits of the people of the times.

¹ Code Com. Rep., pp. 5, 6.

² "These 'special pleadings,' as they are called, frequently became masses of verbiage in which the grain of fact was concealed even from the eyes of trained and learned judges. And this held true not only of the practice in England and the older states of the Union, but in its western states as well, where the woodchopper's axe still echoed around the court-house. 'There are

no judges, no matter how learned,' declared a formal report of able lawyers to the legislature of Ohio in 1853, 'to whom a statement of facts according to the rules of special pleading will not oftentimes be obscure and difficult to understand'; and the fault thus complained of was no new growth in Ohio, but its inheritance from the common law." Hepburn's Devel. of Code, sec. 63.

As if to obviate the objections to the prolixity and abstruseness of special pleading, general pleading was introduced, which is next explained.

Sec. j. Common-law form of pleading—General pleading.—General pleading was a form of pleading inaugurated to obviate the objections to special pleading, and consisted in the formation of short, terse forms of allegation for various actions, which wholly failed to state the facts. The Ohio Code Commissioners said of it: "A more emancipation from all the rules of pleading could scarcely be desired. This kind of pleading discloses nothing to the court, to the jury or to the parties. The former kind, abounding in verbiage, subtlety, and abstruseness, often conceals the facts in special and technical allegations, while this, remarkable for brevity, does not state them at all. It has proved the more acceptable and popular method, and has gained steadily on special pleading."

If the pleadings in a cause consisted of a common count and the general issue, it was next to impossible to perceive what the real issue was.

The common counts were classified into: (1) *Indebitatus assumpsit* or *indebitatus* counts, (2) *Quantum meruit* counts, and (3) *Quantum valebant* counts. These were further classified into money counts, use and occupation, board and lodging furnished, goods sold and delivered; goods bargained and sold; work, labor and services; work, labor, and materials, etc.

An illustration of the common count is as follows:

"Plaintiff says that there is due him from the defendants, for money had and received, the sum of \$—, with interest thereon from — at —, from —, which has never been paid, nor any part thereof, though often demanded.¹

It is said by good authority that a cause of action stated in the form of a common count *in assumpsit* is good under the code,² and that an action upon an account may be in the form of a common count.³

The practice of using the common counts under the code should be condemned, because it is the continuance of something which the framers of our code certainly did not intend

¹ McNutt v. Kaufman, 26 O. S. 127.

² Swan's P. & P. 177.

³ Hazen v. O'Conner, 14 O. C. C. 529. Pomeroy on Code Rem., sec. 543-4, says that the great weight of authority sanctions their use. The

Supreme Court of Ohio, in McNutt v. Kaufman, 26 O. S. 127, said that the common count used in that case should not be adopted as a precedent, but held it good.

should be continued. It was the purpose of the code to adopt a form of statement between the two extremes of special and general pleading.

Sec. k. The code form of statement of the cause of action.—As was just stated, it was intended by the framers of the code to adopt a system which would be a medium between the old form or manner of statement. It is denominated the Fact System. It was the purpose of the code to have “a statement of the facts constituting the cause of action or defense, in *ordinary* and *concise* language and without repetition. The code demands that pleadings be plain and truthful. To this end the forms and rules of statement of the old system and fictions were abolished, and the pleadings were required to be verified.” The code commissioners said: “We do not aim to make pleading a system of dialectics, nor to lay the foundation for a new and cunning science of disputation. On the contrary, the aim is to avoid such a result and confine pleading within its proper bounds, making it a mere auxiliary in the administration of justice, never defeating it. *We would not allow it to impede the cause of justice, by deciding causes, not upon their merits, but by its rules which are sometimes only ceremonial.*”

This language ought to be a warning to those lawyers of the present time who are constantly distorting the spirit of the code by the frivolous and technical practice under the guise of motions. But this matter will be discussed at another place.¹

It seems strange, indeed, at this age that there should have been so much opposition to the code and criticism of it. It was principally centered upon the manner of statement of facts. The word *facts* had obtained a specific and well-defined meaning before the enactment of the code. Pleading has always been defined as the statement, in a logical and legal form, of the *facts* constituting the cause of action or defense.² The code has only changed the form of statement. The *facts* must now be stated in *ordinary* and *concise* language, rather than in abstruse and prolix language. The same facts must be stated since as before the adoption of the code. Whatever facts were essential and material before the code, to give a party a cause of action, or to constitute a ground of defense, are still essential and material and must be stated in the pleading. The same test applies.³

The statute “requiring a complaint to contain a statement of facts constituting the cause of action, in plain and concise lan-

¹ See sec. l, *post*.

² *Dennistown vs. Bank*, 1 W. L. M.,

³ *Waler v. Robinson*, 1 W. L. M., 102.

guage, without repetition, and in such manner as to enable a person of common understanding to know what is intended, embodies the common-law rule requiring the facts to be set forth 'with certainty.' The common-law rule, as stated by Mr. Chitty, is as follows: 'The principal rule as to the mode of stating the facts is that they must be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment.' The rule has not been changed under the code practice, but, on the contrary, has been emphasized by express enactment of the legislature. The code provides that 'the first pleading on the part of the plaintiff is the complaint. The complaint shall contain: * * * Second, a statement of facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.' True, the statute does not use the words 'with certainty,' but that is its evident meaning."¹

Sec. l. Abuses in the present system.—The code system of pleading and procedure has not been without its abuses; as a system it is all right, it is only the use that is made of it. There are so many preliminary, technical, time-consuming controversies that are very annoying. All that has to be done to make things move smoothly under the present system is to be able to state what is required to constitute a cause of action, and then determine what plain, sensible men, not quibblers, should do when that rule has been complied with. There is always great complaint about delay in the administration of justice. A very large portion of that delay is the fault of the lawyers and the judges. Courts spend entirely too much time in hearing and determining technicalities, intricate questions of pleading and practice, which in no possible way benefits the court, judge, or the parties, but on the contrary do a positive injury to both lawyer and client. Such practice consumes the time of the lawyer which might be devoted to something more profitable to himself; and if he makes his client pay him for time so foolishly spent he is not honest. A lawyer of reputation and standing will make some foolish motion, which the court out of respect feels bound to take time to consider. An able judge has said with reference to this matter: "As we practice now we have a flood of motions and preliminary con-

¹Speeder Cycle Co. v. Peeters, 48 N. E. 595 (Ind. App. 1897).

tests, which tend to engulf all else. * * * Some of these involve the merits of the cases in which they are made, but the proportion is very small. Yet under our system of practice they are all motions which the parties have a right to make, and which the court is required to hear and determine. I maintain that a system which permits such a waste of time and labor, to the exclusion of the proper and legitimate trial of cases upon their merits, does delay, if it does not tend to deny justice. The lawyers of this state ought to find some method or form of practice which should prevent this waste and loss of time. We ought to have fewer motions and preliminary hearings and more trials; less time and labor spent in technicalities and more in arriving at the real merits of the real controversy between the parties."¹

A lawyer who desires to serve his client and to make his profession dignified and honored ought not to file petty motions, which raise merely technical questions which will neither do himself or client any good. This sort of practice does harm to the profession, and breeds a practice almost as harmful as the old special pleading at common law. The lawyer who desires to render the best service in the administration of justice will discourage this practice, will not engage in it himself, and will oppose it whenever he comes in contact with it by insisting that courts will in every way possible endeavor to put a stop to it.

Sec. m. Pleading and procedure embraces what.—Technically, pleading may be defined as the science of stating the cause of action or defense. The law of procedure comprehends also the subjects of pleading, practice and evidence. Before the cause of action can be stated the principles of law governing the rights and liabilities of the parties must be carefully studied; the two branches—substantive and adjective law—must be studied together. When considering the former the constant aim should be to determine how to practically work out the rights of the parties.

Sec. n. Some historical facts with reference to codes.—The first code was adopted in New York in 1848. It was prepared by a commission which was appointed in conformity to a constitutional provision in readjusting the courts. The Ohio Code was adopted March 1, 1853, and went into operation July 1, 1853, and was prepared likewise under a constitutional provision,² providing that the General Assembly should appoint three commissioners to revise, reform, simplify and abridge the practice of pleading,

¹Judge Pratt, address before Ohio State Bar Association.

²Art. 14, secs. 1, 2.

forms and proceedings of the courts, and abolish the distinction between actions at law and equity, and report to the General Assembly. This commission suggested in their report that there be no change made in any part of it unless clearly necessary. "In this way," they said, "the Ohio Code will become stable, and the fruits of this undertaking be preserved for a great number of years"; and so has it been.

The code states with year of their adoption is as follows:

New York, 1848; Missouri, 1849; California, 1850; Kentucky, Iowa and Minnesota, 1851; Indiana, 1852; Ohio, 1853; Oregon, 1854; Washington, 1854; Nebraska, 1855; Wisconsin, 1856; Kansas, 1859; Nevada, 1861; Dakotas, 1862; Idaho, 1864; Montana, 1865; Arizona, 1864; North Carolina, 1868; South Carolina, 1868-1870; Arkansas, 1868; Wyoming, 1869; Florida, 1870; Utah, 1870; Colorado, 1877; Connecticut, 1879; Oklahoma, 1890.¹

Other states have adopted Codes of Procedure and Practice departing from the old procedure, but not sufficiently like the codes to warrant classing them as code states, to wit: Mississippi, 1850; Massachusetts, 1851; Alabama, 1852; Maryland, 1856; Georgia, 1860; Texas, 1840.²

A reform was had in England much similar to that in America, by the passage of the judicature acts in 1873, which swept away the system of common-law pleading.³

Sec. o. Advantages of a thorough knowledge of pleading and procedure.—It is not every practitioner who appreciates the advantages to be gained by a thorough and ready knowledge of pleading and procedure. Some in their own mind have passed the period of necessity of consulting books upon pleading and procedure; they are able to state the facts constituting their cause of action as the code requires in ordinary and concise language, and trust to their natural skill for success so far as procedure is concerned. Only years of active practice and study of the books will give one this confidence.

The whole field of law may be said to culminate in pleading and procedure. That is, pleading is the outlet for all substantive law, and one will never attain the proper degree of success unless he becomes thoroughly familiar with this subject. It

¹Hepburn's Hist. Devel. of Code, sec. 88 to 122.

²Hepburn's Hist. Devel., sec. 163-175.

³This suggestion should be fol-

lowed by a careful reading of Hepburn's Historical Development of Code Pleading, sec. 195 to 325, where the Codes of the British Empire are elaborately discussed.

is said that a good lawyer is generally a good pleader. Why? A poor lawyer never can be a good pleader. A good pleader must be a thorough lawyer; he must be able to discern and discriminate; he must be a close student and must have a logical mind. Above, all he must study the law and facts of his case.

It is a popular notion sometimes prevailing among tyros of the law that pleading is a much more important subject than other branches of law. This comes about possibly, because, as has already been stated, it is the outlet for the great body of substantive law. It is highly important that every one should be familiar with pleading and procedure, but he can only do so by becoming master of substantive law. The one is not greater than the other. Yet some may have the ability to make practical use of their knowledge better than others. It has been well said that to be a good pleader gives one an advantage and a rank among his fellows to be acquired by no other single accomplishment.

CHAPTER 1.

ACTIONS UNDER THE CODE.

Sec. 1. Action defined.

2. Form of action under the code.

3. Civil action embraces what

4. Legal and equitable actions under the code.

Sec. 5. Parties, how designated.

6. Issues under code.

7. An action is commenced when.

Sec. 1. Action defined.— An action is an abstract legal right in one person to prosecute another in a court of justice; a suit is the actual prosecution of that right.¹

The words action and suit, however, as used in the code have the same meaning,² though we still speak of an action as applied to an action at law, and a suit as applicable to a suit in equity, thus keeping in mind the former distinction.

Sec. 2. Form of action under the code.— The code³ merely abolished the distinction between actions at law and suits in equity as to name and form, and substituted therefor a civil action;⁴ and the difference between legal and equitable rights still exists in reality, although not in form. The rights and liabilities of parties, legal or equitable, as distinguished from the mode of procedure, remain the same since as before the adoption of the code,⁵ and the court is to be regarded as a court of equity or a court of law, and the petition a declara-

¹ Per Wright, J., in *Joseph Hunter's Will*, 6 Ohio, 502.

² *Kennedy v. Thompson*, 3 O. C. C. 446-7; 3 Blackstone, 116.

³ Sec. 4971; 51 V. 57.

⁴ *Kloone v. Bradstreet*, 7 O. S. 332-5; *Neilson v. Fry*, 16 O. S. 553; *Goble*

v. Howard, 12 O. S. 165, 168; *Culver v. Rogers*, 38 O. S. 537, 540; *Hager v. Reed*, 11 O. S. 626, 635; *Clayton v. Freet*, 10 O. S. 546.

⁵ *Dixon v. Caldwell*, 15 O. S. 415;

Van Buskirk v. Dunlap, 2 W. L. M. 125-9. See *ante*, sec. g.

tion or a bill in chancery, according to the nature of the case as shown by the statement and proof of the cause presented.¹ A judgment, when presented and recorded, is in fact a decree, conferring the same relief which a party might have obtained in a court of chancery, provided that mode of relief be appropriate to the facts of the case.²

The abolishment of the distinction between actions did not affect the principles of law and equity, but only changed a portion of the machinery theretofore used in administering the same; every cause of action invokes the law or chancery powers of a court as completely as did the separate proceedings under the old practice.

Sec. 3. Civil action embraces what.— At one time it was considered that the term civil action embraced only such cases as were known as actions at law and suits in equity, and that there was a distinction between statutory proceedings and a civil action; that therefore suits in partition, dower, divorce and alimony, *habeas corpus*, *quo warranto* and *mandamus*, were not included within the meaning of a civil action.³ This distinction has been abandoned, at least as to partition proceedings, which is now regarded as a civil action.⁴

An application for the probate of a will is not included in the definition of an action or suit.⁵

The code commissioners in their report to the legislature said that a civil action comprehended every proceeding in a court theretofore instituted by any and all of the forms abolished. Every other proceeding will be something other than an action, namely a special proceeding; it was also provided that special statutory remedies not theretofore obtained by action were not affected.

An attachment proceeding has not been regarded as an action but only a provisional remedy;⁶ nor is a proceeding by citation against an administrator,⁷ or to vacate a judgment

¹ Hager v. Reed, 11 O. S. 635; Myers v. Miller, 2 W. L. M. 420. Rush v. Rush, 29 O. S. 440; Linton v. Laycock, 33 O. S. 128. As to

² Kloone v. Bradstreet, *supra*.

³ Barger v. Cochran, 15 O. S. 461.

See, also, Mack v. Bonner, 8 O. S. 387; Yapple's Pldg., p. 288; Chinn v. Trustees, 32 O. S. 236. See sec. 790, *post*.

⁴ Stableton v. Ellison, 21 O. S. 527.

⁵ Joseph Hunter's Will, 6 O. S. 501-2.

⁶ Watson v. Sullivan, 5 O. S. 43; Harrison v. King, 9 O. S. 388.

⁷ Hoffman v. Mackall, 5 O. S. 124.

and to reinstate a cause upon the docket for trial, so considered.¹

A petition impeaching a decree for fraud, seeking relief not obtainable by re-trial, is regarded as a civil action;² and so a petition to vacate a judgment and for a new trial, while it is a special statutory proceeding, as distinguished from the code civil action, must be deemed a civil action within the meaning of the code in order to furnish a remedy.³

Sec. 4. Legal and equitable actions under the code.—Cases occasionally arise in which it is difficult to determine whether or not the facts call for relief in law or in equity. The books abound in cases along or near the vague and indefinite boundary line between the jurisdiction of courts of law and equity, in which attempts have been made to define with some degree of precision the limit of such jurisdiction. Under our system of jurisprudence, where the same court is vested with law and chancery jurisdiction, and in which the distinction between actions at law and suits in equity are abolished, a defendant may raise an objection to the relief sought before final judgment. But he cannot remain silent until he has been defeated in an action, and then upon proceedings in error raise the question that the suit was one in equity instead of an action at law and *vice versa*.⁴

The line of demarcation between the kinds of actions is marked by the code provision⁵ that issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, and all other issues of fact⁶ to be tried by the court; the former being regarded as the legal, and the latter as equitable actions. The code has not, therefore, changed the manner of trial from what it was before its adoption, as the provision as to what issues shall be tried by a jury covers all the issues of fact in the various common-law actions.⁷

Sec. 5. Parties, how designated.—The party complaining shall be known as the plaintiff, and the adverse party as the defendant.⁸

¹ Taylor v. Fitch, 12 O. S. 169.

² Conates v. Bank, 23 O. S. 415.

³ Whitehead v. Post, 3 W. L. M. 195.

⁴ Culver v. Rodgers, 33 O. S. 542,

and cases cited.

⁵ O. Code, sec. 5130.

⁶ O. Code, sec. 5131.

⁷ Bliss on Code Pldg., sec. 10.

⁸ O. Code, sec. 4972.

Sec. 6. Issues under code.—The code¹ abolished what were formerly known as feigned issues, and questions of fact not put in issue by the plaintiff may be tried by a jury upon an order for a trial stating the question to be tried, and such an order shall be the only authority necessary for a trial, or such question may be referred in the same way to one or more persons.²

Sec. 7. An action is commenced when.—A civil action is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.³ An action is not commenced alone by filing a petition and an affidavit for publication, and making publication, but a summons must be issued whether service can be had only by publication or not. The issuance of a summons is a condition precedent to the commencement of every action, without regard to the manner in which service is made.⁴ An action is deemed commenced at the date of the summons which is served on the defendant,⁵ and so far as the right to issue a writ of attachment is concerned, when summons is issued with a *bona fide* intention that it shall be served.⁶ And the action remains commenced although a demurrer is sustained to the petition and leave is given to amend.⁷ An action is regarded as having been commenced within the meaning of the code prescribing the limitation of actions, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; where service is made by publication, the action is commenced at the date of the first publication, if regularly made.⁸ So far as this provision affects the rights of the plaintiff, defendant or third persons, there are two views to be

¹ O. Code, sec. 4973.

² O. Code, sec. 4973.

³ O. Code, sec. 5035.

⁴ O. Code, sec. 5035; Central Savings Bank Co. v. Lagenbach, 1 Ohio Nisi Prius Rep. 124.

⁵ Zieverink v. Kemper, 50 O. S. 208.

⁶ Coffman v. Brandhoeffer, 33 Neb. 283.

⁷ Zieverink v. Kemper, *supra*.

⁸ O. Code, sec. 4987; Neb. Code, sec. 4555; Ind. R. S., sec. 316. The effect of the codes of the states just cited is the same, and unlike the remainder of code states. In New York and Wisconsin it is commenced when the service is served on the defendant, etc., N. Y. R. S., sec. 308; Wisc. R. S., sec. 2629.

taken of it. The jurisdiction of a cause of action attaches upon the filing of the petition, the issuance and service of summons, and the action is commenced so as to arrest the statute of limitation applicable to the particular cause, as of the date of the summons so served upon a defendant, or on a defendant united in interest.¹ If an action commenced in due time be dismissed after the limitation therefor has expired, a new action for the same cause thereafter instituted within a year after such dismissal of the former action, is barred.² It must be conceded that this provision involves a fiction, and that the rule is an arbitrary one. There is no cause of action actually in court until service is effected, when to prevent plaintiff's claim from becoming barred, the time relates back to the date of the summons, and the action is deemed for this purpose commenced as of that time.³ An alias summons issued and served after the limitation has expired cannot arrest the statute.⁴ The commencement of an action in another forum by one of two co-defendants before service is made upon him, but after his co-defendant is served, involving the same cause of action, cannot oust the court in which the first action was filed from the right to determine the same.⁵

There being no statute corresponding with section 4987, applicable to the commencement of a proceeding in error, the supreme court of Ohio has held that such a proceeding was not commenced within the meaning of the provision prescribing the limitation therefor, by the mere filing of the petition in error, but that the appearance of the defendant must be effected by service of summons or otherwise. A proceeding in error is deemed commenced when the petition in error is filed, and a summons issued, which during the life of the writ, is served on the defendant in error; it is commenced in time when the petition is filed and the summons issued within the period limited by the statute for the commencement of such proceeding though the service of the summons is not made until after the expiration of that period, but within the

¹ *Spinning v. Ins. Co.*, 2 Disn. 336; ² *Keighan v. Hopkins*, *supra*; *Totten v. Lawton*, 8 O. C. C. 377; *Burlingim v. Cooper*, *supra*; *Totten v. Zieverink v. Kemper*, 50 O. S. 208; *v. Lawton*, *supra*.

Keighan v. Hopkins, 19 Neb. 33; ⁴ *Republican Valley R. R. Co. v. Burlingim v. Cooper*, 36 Neb. 73; *Sayer*, 13 Neb. 280; *Baker v. Sloss*, *Collier v. Bickley*, 33 O. S. 529. 13 Neb. 230.

³ *Siegfried v. R. R. Co.*, 50 O. S. 294. ⁵ *Totten v. Lawton*, 8 O. C. C. 377.

return day of the writ.¹ This rule was adopted, say the court, because section 4987, as to an original action, by analogy, furnishes the rule by which to determine when an error proceeding is commenced.² An action cannot be deemed to have been commenced when service has been irregularly made, so that it may be set aside,³ or where one of the parties has, by mistake, not been made a party until after the limitation prescribed has expired.⁴ It is especially provided, however, that an action shall be deemed commenced when there has been a diligent effort to procure service, when followed by service within sixty days.⁵ The statute regulating this matter being by analogy applicable to proceedings in error, it has been held that where service proves ineffectual, and is set aside, but is followed by a new writ and valid service within sixty days, a proceeding in error is deemed properly commenced.⁶

An action is not commenced as against the defendant, and it can in no way affect him, except to arrest the statute of limitations, until he has been properly served. Until then the court does not acquire jurisdiction over him, and can make no orders affecting his rights until he has been brought into court in the mode prescribed by law.

The commencement of an action also has an important bearing on the doctrine of *lis pendens*. The code provides that when the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title.⁷

¹ McDonald v. Ketchum, 53 O. S. 519. ⁵ O. Code, sec. 4988; Lambert v. Sample, 25 O. S. 336; Pollock v.

² Bowen v. Bowen, 36 O. S. 312; Pollock, 2 O. C. C. 140; Totter v. Robinson v. Orr, 16 O. S. 285; Buck- Lawton, 8 O. C. C. 377. Service of ingham v. Bank, 21 O. S. 131; Moore the summons must actually be v. Chittenden, 39 O. S. 569. Judge made on the defendant within Bates says that in reckoning time sixty days from its date. Bechthold under the statute of limitations, the v. Fisher, 12 O. C. C. 559.

action is deemed commenced at the ⁶ Ross, Sheriff, v. Willet, 54 O. S. date of service or first publication. 150.

² Bates' Pleadings, p. 977.

⁷ O. Code, sec. 5055. See Collier

³ Grady v. Gosline, 48 O. S. 605. v. Bickley, 33 O. S. 529.

⁴ Bonte v. Taylor, 24 O. S. 628.

CHAPTER 1-A.

ELECTION BETWEEN CAUSES OF ACTION.

Sec. 7-1. Election between remedies—General considerations.	Sec. 7-4. Cases where election may be made—Law and equity.
7-2. Cases where election may be made—Tort and contract.	7-5. Advantages in making an election.
7-3. Cases where election may be made, continued—Fraudulent sales.	7-6. How an election may be indicated.

Sec. 7-1. Election between remedies—General considerations.—There is possibly some difficulty in the application of the principles lying at the foundation of the right of a party to make an election between actions, because of the fictions resorted to in making an election. Mr. Bishop has well said that: "One of the most interesting features of our law is its fictions. Not quite all of them are useful and wise, but most are, and some of them are so essential that they could be dispensed with only at great inconvenience."

This is especially applicable to the subject under consideration. Another matter which materially aids us in determining the right of election between actions under the code, is a familiarity with common-law procedure, and its fictions. The fictions of an implied contract, it is true, was a creature of the common law, to enable parties to sustain an action of *assumpsit*, instead of *case* or *trespass*. The real cause of action remains as at common law, though the form of stating it is changed. Eminent writers have made complaints because the legal fictions are still retained, claiming that they were only necessary because of the forms of action, and when they were abolished the fiction should have been likewise abolished. But in arriving at an election between actions, we are compelled to treat the subject according to the common law. In other words we think and move in the spirit, but not the form of the common-law procedure.¹ The fictitious promise is not alleged under the code.

¹Bliss Pl., sec. 12; Swan's Pl., 48.

The first matter to be understood is what the doctrine of Election means, and in what cases or instances the right of election may be exercised. An election is commonly understood to be a choice between two or more means of redress for an injury; the selection of one of several forms of action allowed by law. "The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars."¹

Sec. 7-2. Cases where election may be made—Tort and contract.—The remedies at common law for tort were originally trespass and replevin, until the addition of the actions of trover, trespass on the case and *assumpsit* through the influences of equitable principles. With the introduction of the action of *assumpsit* came into existence the fiction of the implied contract, and the right of election between the actions for tort and the action of *assumpsit* upon the implied contract. The most common or frequent instance of an election is where one has suffered an injury from a wrong, he may sue in tort, or he may waive the tort and sue upon a contract implied in law. Illustrations of this doctrine of the right of election between tort and contract are cases where a person has been injured by a common carrier; he may sue in tort, or upon the implied contract for the violation of duties imposed by law; or where money is paid by a shipper to a railroad company in ignorance of an agreement made by the company with a favored shipper, whereby the latter receives the money, an action of *assumpsit* for money had and received, lying against the favored shipper who received the money;² or where a bailee to whom goods are delivered for hire, converts them to his own use;³ or where false representations have been made, thereby inducing a sale upon credit.

The same classification of actions into *ex contractu* and *ex delicto* are still observed under the code. Based upon the theory or legal principle that the law implies a promise that a party causing injury to person or property either by violence, willfully, or an act of omission, is the rule that the person injured may treat the action as a tort and bring the action *ex delicto*, or waive the tort and bring an action *ex contractu*, known at common law as *assumpsit*. The injured party may allege a trespass consisting in the taking of goods, according to the facts, and ask for the re-

¹ Chitty Plg., 204-214.

² Barker v. Cory, 15 Ohio 9.

³ Brundred v. Rice, 49 O. S. 640.

covery of their value as damages.¹ The legal obligation imposed by the fictitious contract is still recognized under the code, but the fictitious obligation is not alleged, but only the facts upon which it is based.

The doctrine of election applies where one wrongful act is charged, and the plaintiff is entitled to treat it as having two natures. But the addition of a tort to a separate and distinct act in violation of contract does not deprive the injured party of the right to complain at the same time of both wrongs. Of course he can not recover double damages.²

Sec. 7-2. Where there is a contract and a legal duty. There may be an election in cases where there is both a contract and a legal duty, as where one employs an attorney, physician, or common carrier, and injury accrues, an action may be sustained either in tort or upon the contract.³ The action of tort is for the violation of the duty, and the action on contract is for the violation of the contract to perform the services, or carry goods or passenger.

In the case of a bailment there has always been a choice of forms of action, between actions on the case and *assumpsit*.⁴

Sec. 7-3. Cases where election may be made, continued—Fraudulent sales.—Where a sale is induced by fraud, the vendor may elect to consider it a sale, although the fraud vitiates it and leaves the title still in the vendor, and sue for the purchase price.⁵ There is not generally much to be gained by the vendor in treating a fraudulent sale as a valid one and suing for the purchase money, as in such cases the vendee is usually insolvent, his most efficacious remedy being an action of replevin to recover back the goods themselves where that is possible. For example, if a vendee purchase goods on credit, with intent not to pay for them, the sale is void, and the vendor may recover the property in the hands of an assignee.⁶ But if the goods have been disposed of, and can not, therefore, be reached, their value may be recovered from the vendee to the extent of his ability, or from his assignee to the extent of the assets in his hands. In cases of false warranty the vendee may elect to treat it as a sale, and recoup upon the contract of warranty, or he may rescind the sale and recover damages.⁷

¹ Henry v. Marvin, 3 E. D. Smith 71.

² Railway Co. v. Hedges, 41 O. S. 233.

³ Maxwell Pl., 36; Bliss Pl., sec. 14.

⁴ Hart v. Barns, 24 Neb. 782.

⁵ Byxbie v. Wood, 24 O. S. 607. See sec. 1115 *post*, 47 Md. 112.

⁶ Talcott v. Henderson, 31 O. S. 162; Wilmot v. Lyon, 11 O. C. C. 239.

⁷ Dayton v. Hooglund, 39 O. S. 671.

Sec. 7-4. Cases where election may be made, continued—Law and equity.—It is commonly stated that there may be an election between a remedy at law or in equity, as where land has been sold, and the purchase money has been paid, and the vendor refuses to make a deed, the purchaser has his election to resort to equity for a specific performance, or to a court of law to recover back the purchase money.¹ It would seem that as resort can only be had to a remedy in equity when there is no adequate remedy at law, that the party would have only one remedy, still he might have a choice between the two remedies, that is, he may take the adequate remedy in equity, or the less adequate one at law. Strictly speaking it would seem that the doctrine of election should not apply to this class of cases. An election can only be made between either of two remedies or actions which a party may pursue as of right. The courts have, however, considered that there is a right of an election between an action at law and in equity.² And this right may be demonstrated satisfactorily upon principle. Some writers upon equity jurisdiction

¹ Howard v. Babcock, 7 Ohio (2d pt.) 74, 81.

² "In case a plaintiff has the right to maintain an action at law or a suit in equity, and he elects to bring a suit in equity, demanding only equitable relief, but fails to state sufficient facts in his complaint to constitute an equitable cause of action, and the defendant demurs on the ground 'that the complaint does not state facts sufficient to constitute a cause of action,' the demurrer will be sustained, though the facts alleged are sufficient to constitute a legal cause of action; and so, in case he elects to bring an action at law, demanding only legal relief, but fails to state sufficient facts in his complaint to constitute a legal cause of action, and the defendant demurs on the ground 'that the complaint does not state facts sufficient to constitute a cause of action,' the demurrer will be sustained, though the facts alleged are sufficient to constitute an equitable cause of action. Edson v. Girvan,

29 Hun 422; Swart v. Boughton, 35 Hun 281; Willis v. Fairchild, 51 N. Y. Super. Ct., 405; Fisher v. Insurance Co., 52 N. Y. Super. Ct., 179. In such a case a plaintiff has his choice of remedies, and, having made his election, he must, in the face of a demurrer, abide by his election." Follett, J., in Wisner v. Con. Fruit-Jar Co., 49 N. Y. S. 500. The above is certainly an unsound doctrine, as it is a fundamental principle that the prayer will be disregarded and such relief granted as the facts stated show the party to be entitled. Mr. Bliss, sec. 18 Bliss Plg., says: "One who suffers a wrong arising from a breach of contract may have a choice between remedies of a legal and of an equitable nature. Thus, if he would affirm the agreement, he may, in a proper case, have an action for damages for its breach, or to recover a specific sum due upon it, or he may sue for its specific performance."

have divided it into three kinds: 1, Exclusive; 2, Concurrent and 3, Auxiliary jurisdiction.¹ There are certain matters that are within the *concurrent* jurisdiction of law and equity, in which the law will furnish some relief, but not an adequate remedy, and solely because of the inadequacy of the relief granted at law, equity will step in and furnish full and complete relief.² Those matters which come within the concurrent jurisdiction of law and equity arise out of fraud, mistake and accident. It is not all cases arising out of fraud that are within this concurrent jurisdiction, as some cases, as in cancellation, and reformation, are within the exclusive jurisdiction of equity.³

It follows, therefore, that in all cases which are within the concurrent jurisdiction of law and equity, a right of election may be exercised by the party entitled to the remedy, notwithstanding the fact alluded to at the beginning of this discussion—the inadequacy of the remedy at law. But in all cases which fall within the exclusive jurisdiction of law or equity, no right of election exists. We shall be content with stating these general principles without giving instances of their application.⁴

No doubt by an examination of the reports frequent applications could be found. Where an owner of property allows a municipality to appropriate his property for a street and he prosecutes to judgment his remedy for damages, by electing that remedy he is estopped from seeking to restrain the collection of an assessment for cost of the street.⁵

Sec. 7-5. Advantages in making an election.—There are, of course, advantages in electing to pursue one remedy rather than another. Some of these may be stated, others will depend upon the circumstances and the wants of parties.

There are material advantages to be gained between actions on contract and tort. The statute of limitations running against actions in tort⁶ is for a less number of years than that running against actions based on contract.⁷ Out of the same wrong or transaction there may a liability arise against two different persons, one being upon a contract, the other upon tort. The one liable in tort may be insolvent, while the one liable in con-

¹ Pomeroy's Eq. Jur., sec. 136.

² Pomeroy's Eq. Jur., sec. 139.

³ See Pomeroy's Eq., sec. 140; *Stockton v. Anderson*, 40 N. J. Eq. 488.

⁴ Pomeroy's Eq. Jur., secs. 140,

184, gives the different matters within the concurrent jurisdiction.

⁵ *Hawver v. Omaha*, 73 N. W. Rep. 217 (Neb., 1897).

⁶ R. S., sec. 4982 (four years), 4983 (one year).

⁷ R. S., sec. 4981.

tract is solvent, or *vice versa*; in which event the solvent person is the one against whom suit should be brought.¹

It is also sometimes stated that there may be an election between tort and contract as against an infant and the advantage to be gained in exercising this right of election is that an infant is liable for his torts, while he can not be held for his contracts. The authorities in support of this theory are meagre.² Whether a right of election exists in this case depends upon the fundamental principles of law governing the liability of an infant, a treatment of which strictly does not fall within the province of this work. This is an illustration, however, of how substantive and adjective law sometimes meet upon common ground, it being impossible to determine the remedy without first arriving at a conclusion as to what the primary right is.

There is some authority for holding an infant liable for a tort which arises out of a contractual relation, upon the theory that the moment that he becomes a tort-feasor, his plea of infancy fails him.³

On the other hand, this rule is denied and severely criticised because it is said that to hold an infant liable for a tort growing out of a contract, would be to deny him his privilege of his plea of infancy by changing the form of the action from contract to tort.⁴

When we consider the fact that a tort is a wrong, independent of contract; that though it may grow out of, or be co-incident with, a contract, still it may be committed after the contract, and, therefore, have no connection with it, we can find sufficient reason for maintaining an action of tort against an infant, but not an action of contract. With these comments the subject is left without further definite conclusion.

Sec. 7-6. How an election may be indicated.—At common law an election between two remedies was indicated by the

¹This was so in *Brundred v. Rice*, 49 O. S. 640. The railroad company was liable in tort, but were in hands of receiver. The individuals had property which could be attached.

²Bliss Code Pl., sec. 19.

³*Fish v. Ferris*, 5 Duer 50; *Homer v. Thwing*, 3 Pick. 492; *Hall v. Cocoran*, 107 Mass. 251; *Cooley on Torts*, pp. 124, 125.

⁴*Cooley on Torts*, pp. 123, 125, 126-5; *Eaton v. Hill*, 50 N. H. 235;

Root v. Stevenson, 24 Ind. 115; *Fitz vs. Hall*, 9 N. H. 441. "If a particular wrong is both a tort and breach of contract—not a violation also of a duty which the law had superinduced upon and above the contract—then if infancy would be a defense to an action on the contract, it will be equally such should the injured party elect to sue in tort."

form of action brought. If the liability was treated as a contract instead of a tort, the action was in form of *assumpsit* or in covenant. Under the code the facts must be alleged as they are, and they are the same, whichever view is taken. It is a matter of some difficulty just how an election shall be shown. If the action be founded upon tort the facts are stated and a demand for damages made. If the action is upon contract the same facts are stated and it is left to the court to draw the inference that there was a contract. It is not proper to aver in terms that there was a contract. It would seem that the only manner of indicating an election is by the prayer for relief.¹

¹ *Corry v. Gaynor*, 21 O. S. 277; *Byxbie v. Wood*, 24 N. Y. 607, holds that the only method of indicating an election is by alleging a promise. *Chambers v. Lewis*, 2 Hilt. 591, holds that an election may be shown by the facts averred and by the prayer. See discussion by Pomeroy *Code Rem.*, sec. 572. The form of prayer in an action founded on con-

tract may easily be framed differently from an action on contract. See 88 Wis. 581. "Where the facts stated in the complaint or petition show that the plaintiff is entitled to exercise the right of election, it is held that the prayer may be resorted to to determine whether or not the tort has been waived." 7 *Lawson's R. & R.*, sec. 3694.

CHAPTER 1-B.

ABATEMENT OF ACTIONS.

Sec. 7-7. Abatement of actions— Meaning.	Sec. 7-12. Same continued—Injuries to property.
7-8. What actions survived at common law.	7-13. Same continued—For de- ceit and fraud.
7-9. What actions survive un- der the code.	7-14. Death pending motion for new trial or error in non- survivable actions.
7-10. Same continued—Actions for <i>mesne</i> profits.	7-15. Practice in reviving ac- tions.
7-11. Same continued—Injuries to the person.	

Sec. 7-7. Abatement of action—Meaning.—Abatement of a suit in chancery means a suspension of all proceedings for want of proper parties capable of proceeding therein; while in law the action or the cause of action is entirely dead and can not be revived, because there is no one in whom the right to prosecute it exists.

An action is said to survive when, upon the death of the original party, it can be revived and prosecuted in the name of the personal representative by or against him.

Sec. 7-8. What actions survived at common law.—On account of the language of our statute it is essential that we have an accurate and full understanding of the common-law survivorship of actions; and indeed it is an intricate and difficult matter to trace the history of the English legislation and adjudications with reference to it. Bear in mind the language of the statute. In addition to the causes of action which survive at common law, certain actions therein mentioned also survive.¹ The natural inquiry, therefore, is what actions did survive at common law. The common-law maxim—*Actio personalis moritur cum persona* governed the matter, and originally, as we gather, applied only to those actions arising on torts, and had no relation to those founded upon contracts.² Originally at

¹ R. S., sec. 4975.

² *Zabriskie v. Smith*, 13 N. Y. 322, 333; *Chamberlain v. Williamson*, 2 M. & S. 408.

common law all actions *ex delicto* abated upon the death of either party; and this rule embraced injuries to *person*, to personal property and to real estate;¹ and we likewise learn that it was not without considerable struggle that the rule that causes of action upon simple contracts survived was settled,² those actions upon special contracts, which included covenant and debt, being already assignable and survivable.

Recurring to actions *ex delicto* which abated upon death, we note that they included *trover*, an action for damages for the wrongful conversion of property—now the action of conversion, as commonly called; *trespass*, an injury to real or personal property, or to the person; *case*, recovery of damages for an indirect injury resulting from an injury to real or personal property, or to the person; *detinue*, the recovery of specific personal property; *replevin*, also for the recovery of goods and chattels, with damages, or in form as it was in earlier common law, for illegal taking and detaining goods. All these actions, therefore, originally came under the maxim preventing their survival to the personal representative. The maxim was gradually rendered ineffectual by various English statutes, by allowing actions to survive for injuries to property rights, real and personal.³ The questions of the *assignability* and *survivorship* of causes of actions go hand in hand, those which survive to the personal representative being assignable, and those which did not survive could not be

¹ Russell v. Sunbury, 37 O. S. 374.

² Runchon's Case, 9 Coke, 86; Narwood v. Reed, 1 Plowden, 180; Chamberlain v. Williamson, 2 M. & S. 408.

³ Prior to a certain English statute (3 & 4 W. 4 C. 42, sec. 2) actions for injuries to real property could not be maintained by or against the personal representative of either party upon their death. This statute brought about very material changes in the maxim *actio personalis moritur cum persona*, and from that period actions could be maintained by or against personal representatives for injuries to personal and real property. Chitty's Plg., 79. Under 4 Edw. III. c. 725, 1461; 5 Edw. III. c. 5 (1483), actions for injuries to personal property survived. This statute may be regard-

ed as part of the common law of this state. Russell v. Sunbury, 37 O. S. 374. By 3 & 4 Wm. IV. c. 42, 1830, actions for injuries to the freehold survived. Independently of these statutes a remedy was allowed for a wrongful act against the estate of the wrongdoer when the property or proceeds of the property belonging to another have been appropriated by the deceased person. Jaggard on Torts, p. 32, note 145. "At common law an action for an injury to the person caused by want of skill or negligence of a surgeon, although based on contract, did not survive the death of either party." Vettner v. Gilman, 48 N. H. 416; Zabriskie v. Smith, 13 N. Y. 322; Wheatley v. Lane, 1 Saund. 216; Wolf v. Wall, 40 O. S. 111.

assigned. Rather we might say that those matters in which some right might be passed to another, especially a personal representative, can be assigned, and consequently the right to prosecute must survive; while, on the other hand, causes of action for torts, such as slander, assault and battery, false imprisonment, seduction and others, are purely personal to the party injured, and hence must abate with his death.¹ As Lord Mansfield said, cause of action for tort produces no gain to the party committing it, and must die on account of the cause.²

After considerable controversy it was finally settled that all negotiable paper was assignable, but by reason of ancient technical rules of common law the assignee was obliged to sue in the name of the assignor, though in equity he could sue in his own name, and whatever was assignable survived to the personal representative. All causes of action arising out of contract, unless purely personal to the party and executory, survived.³ All the demands *ex delicto* were capable of assignment, excepting those which were purely personal torts, such as assault and battery, false imprisonment, malicious prosecution, slander and libel.⁴ The line of demarcation separating those actions which survive from those that do not is, that in the first, the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental.⁵ An action for wrongful death was allowed to be brought after the death of the party injured by a separate statute—the Lord Campbell's Act.

Measured by the rules brought about by the various English statutes, which were so antique when our code provision was adopted as that they were common law to us,⁶ we have the rule, that all actions arising upon contracts other than those purely personal and executory, and actions for injuries to personal and real property survived. Those were the actions which the legis-

¹ The test of assignability was the element of survivorship. *Byxhie v. Wood*, 24 N. Y. 607; *Haight v. Hoyt*, 19 N. Y. 464; *Jordon v. Gillen*, 44 N. H. 426.

² *Hambly v. Trott, Cowper*, 374.

³ *Pomeroy's Code Rem.*, sec. 147.

⁴ *Bates' Plg.*, 15, 16.

⁵ *Jenkins v. French*, 58 N. H. 532; *Broom Max.* 702; *Com. Dig.* "Admin-

istration" B., 15; *Hambly v. Trott, Cowper*, 375; *Chamberlain v. Williamson*, 2 M. & S. 408; *Wade v. Kabfleisch*, 58 N. Y. 282; *Lattimore v. Simmons*, 13 S. & R. 183; *Chitty's Pleading*, 67, 90; *Bouv. Inst.*, 2755, 2756.

⁶ "This statute may be regarded as part of the common law of this state." *Russell v. Sunbury*, 37 O. S. 374.

lature had in mind when saying: "In addition to those actions which survived at common law, etc." And yet we might conclude that the statute meant that only those actions which survived at common law, disregarding the changes brought about by the English statutes. This would seem so by reason of the fact that the causes of actions for injuries to real and personal property are especially mentioned as surviving, as though they did not survive at common law; this may be technically correct, as they did not survive but for the statutes.

To show how the matter is considered the following statement is made, which is taken from a recent Supreme Court decision. As a general rule, at common law, actions *ex contractu* survived, while actions *ex delicto* abated. But actions *ex delicto* so far as the act complained of resulted in damage to property, the action survived, but under the action *ex contractu*, an action for breach of promise to marry was not included.¹ In common parlance the actions which did not survive at common law were those for the recovery of damages purely personal, such as assault, false imprisonment, malicious prosecution, slander and libel, and malpractice. The code has changed the common law to some extent.

Sec. 7-9. What actions survive under the code.—As shown by the preceding section, the only actions which did not survive according to English law—being, as we have seen, shaped and moulded by English acts of Parliament—were those

¹This is what the Supreme Court in 1889 say in *Village of Cardington v. Admr. of Fredericks*, 48 O. S. 448. And this view bears the author out in the conclusion reached after running down the history of the matter, and shows the light in which the common law is viewed, is as it was changed and moulded by the various acts of Parliament, so that in enacting the Ohio statute there was really no use in saying that injuries to property also survived as the common-law actions, so far as they resulted in an injury to property, but only did not survive when the injury was purely personal. But it all depends upon what kind of lenses we are looking through when we are determining what the common law is. Judge Johnson, in

37 O. S. 374, in speaking of the common-law rule of actions *ex delicto* abating, seemed to have in mind that it included injuries to person, personal property and to real estate. The reason for the distinction was stated in *Chamberlain v. Williamson*, 2 M. & S. 408, thus: "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except those wrongs which operate to the temporal injury of their personal estate." In other words, the pain and suffering endured, or the impairment of the body, not being a property interest, did not pass to a personal representative. Nor were such causes assignable. 46 O. S. 448.

actions *ex delicto* (which were purely personal, such as assault and battery, false imprisonment, malicious prosecution, slander and libel, malpractice), or those arising out of contract which were strictly personal and executory. All actions for injuries to property rights, real and personal, and actions for death by wrongful act survived.

Thus stood the English law, whether it be called common law or statutory law which the Ohio Legislature had in mind when framing the following section:

"In addition to the causes of action that survive at common law, causes of action for *mesne* profits or for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."¹

Originally the statute merely followed the English law that injuries to real and personal estate survived, but it is now changed so as to include injuries to the person, as explained in the next section.

From the fact that the statute has already provided that injuries to personal and real property survived, it would seem that they were looking to the common law before the changes made by the statutes which provided that such actions survived, and were but following in the footsteps of England by enacting especial provisions.² Another section goes hand in hand with this one which applies only to *pending* actions or proceedings. No action or proceeding *pending in any court* shall abate by the death of either party thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office.³ This is discussed in the next section.

Sec. 7-10. Same continued—actions for mesne profits.

Causes of actions for *mesne* profits are by the code made to survive, notwithstanding the death of the person entitled to the same.⁴ Why should the code use this language: "Causes of action for *mesne profits*"?

Mesne profits is the value of the premises recovered in an action of ejectment, during the time the premises were illegally kept out of possession, such as are properly recoverable by an action of trespass *quare clausum fregit*, after a recovery in ejectment.⁵ The

¹ R. S., sec. 4975.

⁴ Sec. 4975.

² See full discussion of this matter in *ante* sec. 7-8.

⁵ Osbourn v. Osbourn, 11 Serg. & R., 55; Bacon's Abr. Ejectment A.; 3 Black. Com., 205.

³ R. S., sec. 5144.

code has substituted for the action of trespass for *mesne profits* an action which is described in the code as a claim for "damages for withholding real property and for the rents and profits." The action corresponding to ejectment is recovery of the possession of real property which may be with or without damages. The recovery of the possession of the property is one cause of action while the recovery of the rents and profits is another, and they may be joined.¹ This course is usually taken, although it is not necessarily incumbent on one seeking recovery of the possession of real property to ask for the rents and profits. And if not so asked for, there can certainly be no objection to another suit for the *mesne profits*, and if the original parties die, their personal representative may maintain the action, and in this manner the section will come into practical operation. But there does not exist the same reason for bringing the separate action for rents and profits or *mesne profits* under the present procedure as did at common law. After the original form of ejectment, which was nothing more than a mere personal action for the recovery of damages for the ouster, was developed into the new mixed action—that is, for the trial of title, or for the recovery of the property with damages—the damages usually recoverable therein were very small. Therefore, in order to complete the remedy, an action for trespass could be sustained, after recovery in ejectment to recover the *mesne profits* which the tenant in possession wrongfully recovered.² This action of trespass was a separate action from the prior action of ejectment, and could only be between those who were parties to the prior action of ejectment.³

The action at common law for the recovery of rents and profits or *mesne profits* was in form an action of trespass. But in ejectment the judgment therein rendered was conclusive evidence of plaintiff's right to all profits accruing after the date of the ouster.⁴

The development of the action of ejectment serves to give

¹ R. S., sec. 5019. See *post* sec. 30.

² 3 Black. Com., 205.

³ *Lion v. Burtis*, 5 Cowan, 468; *Jackson v. Randall*, 11 Johns. 405; *West v. Hughes*, 1 Har. & J. (Md.) 574.

⁴ 1 Chitty's Pr., 193; 3 Black. Com., 205; 2 Greenleaf's Ev., 332. Walker says (645) that the *mesne profits* while

the defendant had been in possession of it could not be collected in the original action of ejectment, but a separate action of trespass for *mesne profits* had to be brought. But this does not precisely accord with Blackstone, as he says that to afford a complete remedy because of the smallness of the damages, trespass would lie.

a clearer understanding of the matter. This is given in the note.¹

Sec. 7-11. Same continued—Injuries to the person. The amendment to section 4975, in 1893,² added "actions for injuries to the person," making them also survivable. At the same time section 5144 was amended, dropping actions for assault, or assault and battery, from those actions which abated; and by this section there is no action or proceeding which is pending which abates upon the death of a party, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which abate by the death of either party. Section 4975 refers to actions which have never been brought, or to the right to commence and maintain actions, and not to pending actions,³ while section 5144 refers to those which are pending when the death of either party occurs. If the two sections referred to causes of action in the same stage, there would be some conflict, and indeed as it is there is certainly not perfect harmony between them, and in construing either one the provisions of both must be taken and considered together. It must first be determined what "injuries to the person" mean and what actions it will include; and if we shall conclude that it embraces the actions, libel, slander, malicious prosecution, etc., then there is irreconcilable conflict. The one says they may be commenced, while the other says that if they have been commenced during lifetime, they must abate upon the death of either party. In Georgia, under a statute using the same expression—injury to the person—it was held appli-

¹Ejectment at common law was originally only a personal action for the recovery of damages for a dispossession of land, brought by a lessee who had been ousted therefrom. By means of the influence which equity had over the procedure in courts of law, the action was changed into one for the trial of the title of the plaintiff as the main object, as well as the recovery of damages, and thus became classed as a mixed action. Before it could be adopted as an action for the trial of the title, the use of fictions had to be resorted to. The change in this form of action clearly demonstrates a weakness in the common-law sys-

tem. Desiring to make use of the action for the purpose of trying the title of the lessor's title, it was supposed as the action was maintained by a lessee against a stranger, there would have to be a fictitious lessee, a fictitious ejector, and a fictitious ouster. These fictitious allegations were made, and by consent of the court the adversary consented to these fictions, so that the question of title only was left for decision. Walker's Am. Law, 620; 3 Black. Com., 199; Shipman's Com. Law Plg., 118, 119. See sec. 30, *post*.

²90 O. L. 140.

³Russell v. Sunbury, 37 O. S. 375.

cable to actions for libel.¹ And in Michigan under a statute² providing for the revival of actions for negligent injuries to the person, it was held that an action for malpractice survived.³ And this illustrates what the author believes to have been the legislative intent when making the amendment. It was only meant to allow actions for personal injuries, such as those brought about by negligence, to be sustained after death, and while actions for slander and libel, malicious prosecution and nuisance,⁴ may be an injury to the person, they are not such personal injuries by the amendment to section 4975 as were intended to survive.

Actions for damages for wrongful death survive in favor of the personal representative by virtue of an independent provision,⁵ but is classed under the head of an injury to the person; the reason why it was made survivable being merely to provide for the families or next of kin. By virtue of the amendment of section 4975, it may be brought, notwithstanding the death of injured or person causing injury.

And so an action for false imprisonment clearly falls within the phrase—injury to the person—and is not abated according to section 5144; and so with seduction, assault and battery, and malpractice.

A pending action to recover damages for injuries caused by negligence not being within any of the enumerated exceptions in 5144 R. S., does not abate by the death of the party injured.⁶

Sec. 7-12. Same continued—Injuries to property. All causes of action for injuries to *property* may be brought, notwithstanding the death of the person entitled and liable to the same.⁷ This is so broad that it needs little, if any, elucidation. It will be noticed that it uses the general term, property, without distinguishing real or personal property, and as property signifies

¹ Ga. Code, sec. 2967—no action for the recovery of damages for homicide, injury to the person, injury to property shall abate by death of either party. Acts 1888-89, p. 73; Johnson v. Bradstreet, 13 S. E. 250. See Swift v. Bradstreet, 13 S. E. 250.

² How St., sec. 7397.

³ Norris v. Grove, 58 N. W. 1006 (Mich.). Not under former statute. Wolf v. Wall, 40 O. S. 111; see also Best v. Vedder, 58 How. Pr., 187.

⁴ An action against a village for injury caused by unsafe and negligent construction of street is an action for nuisance, and abates. (Cardington v. Fredericks, 46 O. S. 442.) If death had resulted it would have been different and would not have abated. Boyd v. Village of Cambridge, 4 O. C. C. 519, 521.

⁵ R. S., sec. 6134.

⁶ O. & P. Coal Co. v. Smith, 34 W. L. B. 94; 53 O. S. 313.

⁷ R. S., sec. 4975.

the right which a man has in land and chattels to the exclusion of others, it will embrace all actions of every description that may be instituted concerning real or personal property. It matters not how the injury was occasioned, whether by negligence or by the result of direct force.¹ "An injury to personal estate" under the former statute was held to include damage done to some specific property, of which the person was the owner. It is not damage arising incidentally or collaterally.²

Sec. 7-13. Same continued—For deceit and fraud.—Actions "for deceit and fraud" also survive the death of either party.³ It would seem at first glance that causes of action arising from fraud and deceit might fall under "injuries to property," but the nature of the action arising from fraud is somewhat different. Is it true that a chose in action or right of action partakes of the nature of a property right.

In Michigan it was held that an action by the husband's heirs against his widow, for fraudulent destruction of his title deeds to land and procuring title in her own name, was not within the meaning of injuries to real or personal estate.⁴ But it would come under fraud and would survive. This section will embrace a cause of action for deceit, in inducing one to loan money to another by falsely representing that the borrower is good.⁵

Sec. 7-14. Death pending action for new trial or error in non-survivable actions.—Personal actions at common law, as well as by statute, except as modified by recent changes as pointed out, we have seen abate by the death of the party.⁶ But even in such actions or in any action which abates upon death of either party, if death occurs after verdict,⁷ or during the pendency of a motion for a new trial,⁸ or during the pendency of error proceedings,⁹ the action does not abate. Especially so, after an appeal or error proceeding has been submitted, though not decided. The court may in such case enter judgment

¹ Hall v. R. R. Co., 1 Disn. 58; 245; Mackey v. Rhineland, 1 Moore v. Massini, 32 Cal. 590. Johns. Cases, 408.

² Wolf v. Wall, 40 O. S. 111.

³ R. S., sec. 4975.

⁴ Stebbins v. Dean, 82 Mich. 385.

⁵ Hadcock v. Osmer, 38 N. Y. S. 618.

⁶ Ante secs. 7-8, 7-9.

⁷ Dial v. Holter, 6 O. S. 228, 246; Collins v. Prentice, 15 Conn. 423; Ryghtwayse v. Durham, 12 Wend.

⁸ Hilker v. Kelley, 30 N. E. 304 (130 Ind. 356).

⁹ First National Bank, 49 Fed. 120 (a tort); Carr v. Rischer, 119 N. Y. 123; Hart v. Washburn, 16 N. Y. S. 923; Phelan v. Tyler, 64 Cal. 80; Beck v. Dowel, 40 Mo. App. 71 (personal injuries).

as of the date of the submission.¹ This is upon the principle that where death occurs after a verdict and before judgment or even a final judgment by higher courts, the right has already been established, it should continue in force, and a judgment given upon it as of the time when rendered. This is done by an entry *nunc pro tunc*, the power to make which is discretionary which is exercised in proper cases to prevent justice.²

Sec. 7-15. Practice in reviving actions.—This subject is discussed in a subsequent chapter.

¹ *Danforth v. Danforth*, 111 Ill. 236.

² *Dial v. Holter*, 6 O. S. 228, 246.

CHAPTER 2.

PARTIES.

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| <p>Sec. 8. The manner of treatment.</p> <p>8a. Changes and distinctive features of the code as to parties.</p> <p>8b. Real party in interest.</p> <p>8c. Assignments—Assignees—Suits by.</p> <p>8d. Right of set-off—Counter claim and defense not impaired by assignment.</p> <p>8e. Plaintiff in action on bonds.</p> <p>9. Trustee of an express trust.</p> <p>10. Action by officers.</p> <p>11. When wife may defend.</p> <p>12. Insane persons and infants.</p> <p>13. Joinder of parties plaintiff.</p> <p>14. Joinder of parties defendant.</p> <p>14a. Same continued—Kinds of obligations — Contractual.</p> | <p>Sec. 14b. Same continued—Actions <i>ex delicto</i>.</p> <p>15. One suing for all.</p> <p>15a. Same continued—Illustrative cases.</p> <p>15b. Persons severally liable.</p> <p>15c. How partners may sue and be sued.</p> <p>15d. When action shall not abate.</p> <p>15e. Transfer of interest pending suit.</p> <p>16. Ordering parties brought in.</p> <p>16a. Person claiming an interest in property made party.</p> <p>17. Remedy for misjoinder.</p> |
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Sec. 8. The manner of treatment.—Only general principles of the law governing parties to actions—historical and fundamental—will be discussed in this chapter, and particular rules and principles are treated in connection with the special subjects and actions. This is believed to be the more convenient.

Sec. 8a. Changes and distinctive features of the code as to parties.—The law governing parties to actions forms a very important and difficult part of the subject of pleading. A very careful study of the situation and the relationship of parties who may be held and who may not be held liable, must be made before the pleading is drafted. And before we can fully appreciate and understand this branch of the subject we must carefully study the history of the law of procedure. The changes made by the code necessarily brought about many material changes in the law of parties. The code not only rendered changes in the law of parties on account of the abolition of the forms of action

necessary, but a change was also made necessary by reason of changes in the division of actions, as affecting venue. Whether or not you may bring an action against certain parties in a particular place or venue, will depend upon what the provisions of the statute regulating the subject of venue are.

At common law actions were local and transitory, the former being brought where the facts or subject of the action occurred or was, the latter in any county. While the code has in fact partially retained this distinction in substance, still there may be some difference, and hence it has an important bearing upon the law of parties, and should be studied in that connection.

The rules at common law governing parties were quite dissimilar from those which have been formulated under the code procedure. Necessarily so because of the consolidation of legal and equitable actions under the code into the single civil action. The law of parties prevailing in law and equity differed radically; those of the former being very unsatisfactory, while those of the latter, being framed to relieve the harshness of the law, were much more liberal and satisfactory.

When the codes were adopted, therefore, and law and equity, so far as the form of procedure was concerned, were blended into one system, it was but natural that the framers would draw principally from equity in the formation of the code, so far as it relates to parties.¹ The code as to parties is drawn principally from the rules of equity, though some rules common to both law and equity were retained. It is not necessary to philosophize upon the intention of this provision to abolish the common-law rule which prohibited an action at law being prosecuted in the name of any person other than the original obligee, although he had transferred his interest therein to another, as the system has become so thoroughly imbedded in American jurisprudence, and so well understood that such a task is useless, and there are those who have made the philosophy of the various branches of law a specialty. The scope and object of this work being entirely practical in its character, nothing further, therefore, will be attempted than some useful illustrations. To go very far into the domain of illustrations upon the subject of parties would be to swell

¹ The Code Commissioners of New York used this language in their report, which was inserted in the report of the Ohio Code Commissioners: "The rules respecting parties in the courts of law differ from those in the courts of equity. The

blending of the jurisdictions makes it necessary to revise these rules. If we would have but one system of practice, we must have but one common set of rules in regard to parties."

a book beyond the patience of the practitioner; and yet, being an essential part of pleading, it deserves equally as much attention as any other branch. The principal change wrought by the code was the repudiation of the common law, by allowing an assignee to sue in his own name, dispensing with the necessity of suing in the name of the original assignor or of making him a party, and in the incorporation of all the equitable rules as to parties into the code. At common law it was necessary to aver that an assignment was made with the consent of the owner, though such was not the case in equity. The purpose of the code, therefore, was to assimilate the practice in the courts of law to that which prevailed in equity, by permitting the real party in interest to sue in his own name.

Sec. 8b. Real party in interest.—The codes provide that every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in special cases.¹ This was the rule in equity practice. The common law only allowed an action to be maintained by him in whom the legal right was vested; no equities were recognized. Where at common law an assignment of a chose in action would pass only an equitable title, it is the policy of the code to vest in the assignee the legal title, and consequent right of action in his own name.²

The real party in interest is the party who will be benefited by the action or the one who will be injured by the judgment. The language of the code is mandatory; the action must be prosecuted in the name of the real party in interest;³ and if not so done the fact that the plaintiff is not the real party may be interposed as a defense and the action may be defeated by showing that some other person is the real party in interest.⁴ This defense, however, must be set forth by alleging the *facts* in an answer showing how plaintiff is not the real party in interest like other defenses.⁵ An allegation in a defendant's pleading, that plaintiff "is not the real party in interest" constitutes a mere legal conclusion and raises no issue.⁶

¹ O. Code, sec. 4993; Pomeroy's Code Rem., sec. 124.

² Whitman v. Keith, 18 O. S. 134, 143. "His title is not a mere equitable title, as before the adoption of the code, but a legal title." Allen v. Miller, 11 O. S. 377.

³ Hall v. Plaine, 14 O. S. 423; Eaton v. Alger, 57 Barb. 179.

⁴ Osborn v. McClelland, 43 O. S.

284, 295; James v. Chalmers, 6 N. Y. 209.

⁵ Curtis v. Gooding, 99 Ind. 45; Hammond v. Earle, 58 How. Pr., 426; Jackson v. Whedon, 1 E. D. Smith, 141; Coffin v. Hydraulic Co., 18 N. Y. S. 782; *aff'd*, 136 N. Y. 655. It is too late on error. Giraldin v. Howard, 103 Mo. 40.

⁶ Van Dyke v. Gardner, 47 N. Y. S. 710.

One to whom an instrument is transferred merely as collateral security¹ or for collection,² or to whom paper is made payable as agent even though not so designated, may sue in their own names.

It is not alone cases of assignment to which this provision is to be applicable, but it is extended to other instances. Who is the real party in interest will depend upon the circumstances and situation of the parties. Guided by the rule that the real party in interest is the party who will be benefited or injured, it may be readily seen that it will embrace other relations of parties than those who may be connected by anything capable of assignment. The relation created by assignment is the most conspicuous because in direct contrast with the common law, and is more especially discussed in the next section.

Where a promise is made to one for the benefit of the other, he for whose benefit it is made is the real party in interest and may bring an action for its breach either in his own name or in the name of the party to whom made.³

Illustrative of this rule is where a grantee of real estate assumes and agrees to pay an incumbrance thereon, the mortgagee may sue such grantee upon his personal obligation.⁴ An agent or trustee or person in whose name a contract is made for the benefit of another, may also sue without joining the party for whose benefit the suit is brought.⁵ And where one enters into a contract with another in his own name, when in fact he was an agent, and does not disclose such agency, the principal though not disclosed may, nevertheless, bring an action thereon in his own name.⁶

Sec. 8c. Assignments—Assignees—Suits by.—In this commercial age there are but few instruments which are not as-

¹ Wetmore v. San Francisco, 44 Cal. 294.

² White v. Stanley, 29 O. S. 423; Knight v. Ins. Co., 26 O. S. 664.

³ Miller v. Florer, 15 O. S. 148, 151; Trimble v. Strother, 25 O. S. 378; Brewer v. Maurer, 38 O. S. 550.

It is a proposition firmly established in jurisprudence that one not a party to a contract may maintain an action thereon, when such contract is made for his benefit or the benefit of a class to which he be-

longs Cooper v. Foss, 15 Neb. 516; Shamp v. Meyer, 20 Neb. 223; Doll v. Crume, 41 Neb. 655; Barnett v. Pratt, 37 Neb. 349; Rohman v. Gaiser, 37 N. W. 923.

⁴ Brewer v. Maurer, 38 O. S. 543, 550; Pomeroy's Code Rem., sec. 139, p. 169. Other cases given by latter authority

⁵ Rice v. Savery, 22 Ia. 470; Pomeroy's Code Rem., sec. 141, p. 175.

⁶ St. John v. Griffith, 2 Abb. Pr., 198; Hall v. Plaine, 14 O. S. 417.

signable. And while it is essential that a pleader fully understand when an action may be brought by an assignee, no review of the question will here be attempted further than the appended note, but special works should be consulted.¹ The assignment should be in writing, although it has been held that a person holding a note and mortgage by a verbal assignment may maintain an action therein in his own name.² Assignments are frequently made for purposes other than the transfer of actual ownership, which class the pleader should have well in hand. Reference is made to those instruments which are transferred to another, to which there is also annexed some collateral agreement; as, for instance, where the assignee is to sue and collect for the owner and account for the proceeds. The universally accepted construction of the code is, that the assignee in such case is the party in interest and may sue in his own name.³ This will include an

¹ The most common is commercial paper. An action may be brought by an assignee of an open account (*Knadler v. Sharp*, 36 Ia. 232); or of stock in a corporation (*Railroad Co. v. Fink*, 41 O. S. 321); or of a claim of a principal against an agent (*Grant v. Ludlow*, 8 O. S. 1); or of a reversion of a lease (*Masury v. Southworth*, 9 O. S. 340; *Smith v. Harrison*, 42 O. S. 180); or a contract of guaranty (*Bank v. Jones*, 16 O. S. 145); or to pave streets (*Ernst v. Kunkle*, 5 O. S. 520); or of a right of an officer to his fees (*Porter v. Dunlap*, 17 O. S. 591); or of salary (*Insurance Co. v. Hessberg*, 27 O. S. 393). An executory contract for services can be assigned by an employer only by consent of the employee. *Chapin v. Longworth*, 31 O. S. 421. Nor can an assignee without indorsement for value sue as against an equitable owner. *Osborn v. McClelland*, 43 O. S. 284; *Hays v. Hathorn*, 74 N. Y. 486. An indorser of notes who has paid a judgment thereon, and taken an assignment of a right of action against a justice of the peace for his failure to collect the same from the maker, is not the real party in interest to maintain an action against the jus-

tice, but the right exists in the holder and owner of the notes. *Dehn v. Heckman*, 12 O. S. 181. See *Pomeroy's Code Rem.*, sec. 124 et seq., where this subject is thoroughly treated.

² *Barthol v. Blakin*, 34 Ia. 452; *Moore v. Lowrey*, 25 Ia. 336.

³ *White v. Stanley*, 29 O. S. 423; *Saulsbury v. Corwin*, 40 Mo. App. 373; *Brumback v. Oldham*, 1 Idaho 709; *Young v. Hudson*, 99 Mo. 102; *Allen v. Brown*, 44 N. Y. 228; *Sheridan v. Mayor*, 68 N. Y. 30; *Haysler v. Dawson*, 28 Mo. App. 531 (1888), an account; *Minn. T. M. Co. v. Heipeler*, 49 Minn. 395, a draft taken for collection. A person holding the legal title of a note, though he be an agent or trustee, and liable for the proceeds to another, is the proper party to sue, although the defendant may make such defenses thereto as exist against the real party in interest. *Cottle v. Cole*, 20 Ia. 481; *Abell Note*, etc., *Co. v. Hurd*, 52 N. W. Rep. 488 (Ia., 1892); *Minn. T. M. Co. v. Heipeler*, 49 Minn. 395; 52 N. W. Rep. 33 (1892); *Elmqvist v. Markoe*, 45 Minn. 305; *Young v. Hudson*, 99 Mo. 102; *Herron v. Cole*, 25 Neb. 692; *McDaniel v. Pressler*, 3 Wash. 636; *Curtis v. Sprague*, 51 Cal. 239.

assignee who is to pay some indebtedness for the assignor,¹ or an assignee of a chose in action in which others are beneficially interested.²

An assignee of a claim for damages to either personal or real estate may sue.³ But a person to whom a note is transferred by mere delivery for the purpose of collection cannot sue in his own name.⁴ Before the code an assignee of only part of a demand could not sue thereon;⁵ but now he may sue and obtain relief by making the assignor a party.⁶ And the owner may intervene to protect his own interests in the action.⁷

An assignee of a judgment, the proceeds of which are to be paid to several persons, is nevertheless the real party in interest, and may bring an action thereon without joining those interested as parties.⁸ And so is the assignee of a judgment obtained in a garnishee process the proper party plaintiff in an action against the garnishee.⁹ A plaintiff in an action of replevin may sue in his own name on a redelivery bond, which is made to an officer as the real party in interest;¹⁰ and a partner to whom his copartner has assigned a partnership claim may sue thereon as the real party in interest.¹¹

Sec. 8d. Right of set-off—Counter-claim and defense not impaired by assignment.—It is provided that when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired.¹² This allows the defendant to interpose any defense he may have had at the time or before notice of the assignment against the assignor.¹³ And claims may be set off against those persons who are the equitable owners of the demand in suit, without regard to the nominal parties to the record. That is, the party in interest, and not merely the party of record,

¹ *Vimont v. Railroad Co.*, 64 Ia. 513; *Ginocchio v. Canal & M. Co.*, 67 Cal. 493; *Walburn v. Chenault*, 43 Kan. 352.

² *Allen v. Brown*, 44 N. Y. 228; *Williams v. Brown*, 2 Keyes, 486.

³ *Hall v. Railroad Co.*, 1 Disn. 58.

⁴ *Nichols v. Gross*, 26 O. S. 425. Cf. *Eaton v. Alger*, 47 N. Y. 345.

⁵ *Stanberry v. Smythe*, 13 O. S. 495-500.

⁶ *Grain v. Aldrich*, 38 Cal. 514; *Lapping v. Duffy*, 47 Ind. 51; *Allen v. Miller*, 11 O. S. 374-8.

⁷ *Gradwohl v. Harris*, 29 Cal. 150.

⁸ *Walburn v. Chenault*, 43 Kan. 352 (1890), citing *Allen v. Brown*, 44 N. Y. 228; *Williams v. Norton*, 3 Kan. 295.

⁹ *Whitman v. Keith*, 18 O. S. 134.

¹⁰ *Kimball v. Bleick*, 32 Pac. Rep. 766.

¹¹ *Stuckey v. Fritsche*, 77 Wis. 329 (1890).

¹² Code, sec. 4993.

¹³ *Beckwith v. Bank*, 9 N. Y. 211.

is the one against whom the set-off should be made.¹ A judgment debtor may, in an action by the assignee of a judgment thereon, set up by way of set-off, an indebtedness to him from the judgment creditor accruing before the assignment to the plaintiff.² There are special statutory provisions regulating the equities existing between parties to negotiable paper transferred after maturity. It is only when such paper is transferred after maturity that it is subject to equities, that is, any defenses which the maker may have had against the original obligee.

The section under consideration provides that the right of set-off, counter-claim, and defense, *as are allowed by law*, shall not be impaired. Then what are allowed by law? All that existed at the time of the assignment as between the original parties, of whatsoever kind, legal or equitable.³

Sec. 8e. Plaintiff in action on bonds.—The equity rule, incorporated in the code that the real party in interest may bring suit is made applicable to cases where a person forfeits his bond, or renders his sureties liable, allowing any person injured thereby, or who is by law entitled to the benefit of the security, to bring an action thereon in his own name upon such bond.⁴ Official bonds, such as state, county and municipal officers, are made payable to the state; and so with the bonds of executors, administrators and guardians; but the test under the statute as to who will be entitled to sue is the person injured by the breach or who is entitled to the benefit of the security. In case of defalcation on the part of certain state or county officials, the state or county alone is injured or entitled to the benefit of the security, and must, therefore, bring suit; as suit upon a county treasurer's bond for failure to pay over money received as such treasurer⁵ or for money unlawfully received by the officer out of the fund of the county treasury, as compensation for services;⁶ or on the bond of a township treasurer, given to secure the disbursement of the school funds.⁷

Official bonds may be divided into two classes so far as the parties to actions thereon are concerned. One, where the bond is given as a security to protect the rights of individuals; and the

¹ *Miller v. Florer*, 15 O. S. 148, 151, 152.

² *Gildersleeve v. Burrows*, 24 O. S. 204.

³ This is fully explained in *Pomeroy's Code Rem.*, sec. 162.

⁴ Code, sec. 4994.

⁵ *Kelly v. State*, 25 O. S. 567; *Hunter v. Commissioners*, 10 O. S. 515 (the county commissioners are not proper parties).

⁶ *State v. Kelly*, 32 O. S. 421.

⁷ *Board of Education v. Kersinger*, 2 W. L. M. 474.

other, where it is taken to protect the rights of the public. And this section of the code under consideration was undoubtedly enacted to enable a private individual, when he has suffered an injury by a breach of the bond, to bring the suit thereon, instead of the state, the obligee named, since the state in such case has no interest therein.

For example, an individual may be injured by the failure of a sheriff to pay over money collected in a suit or by failure of an executor, administrator, trustee or guardian to perform some official duty. In this class of cases the party injured must sue in his own name, and set out the giving of the bond, its terms, and the act of misconduct or neglect by which he claims that the bond was forfeited and he personally injured; and in so doing he will show a right of action in himself, in which no other person has any interest.¹

In the other class of cases, where the bond is given to protect the public right, the state stands as the legal representative of the public right. It matters not whether the money is required to be kept in the hands of the treasurer of the state, of a county or of a township; but whether the money to be paid into the hands of the one or the other, it is public money and subject to be disposed of by the legislation of the state as public money. So school funds are public funds to be applied under the law for a public use, without regard to the fact whether they are in the hands of the state, county or township treasurer. In this class of cases the suit must be in the name of the state.

If the action be upon the bond of a state official, then the attorney general of the state should bring the suit; if upon the bond of a county or township official, the prosecuting attorney being the representative of the latter should bring the suit, but in either case in the name of the state.²

The foregoing rules may be easily applied to all kinds of bonds, as actions upon the bond of a justice of the peace,³ county clerk, recorder, etc., and other officer. If the injury is to the individual, as it is usually in such cases, then he must bring the action; if to the public, then the state must bring the action.

Sec. 9. Trustee of an express trust. — There are three classes of exceptions to the rule that the real party in interest shall prosecute an action, namely: An administrator, executor, guardian, or trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another,

¹ Board of Education v. Kersinger,
2 W. L. M. 474.

² See State v. Kelly, 25 O. S. 421;
Kelly v. State, 25 O. S. 567.

³ Aucker v. Adams, 23 O. S. 543.

or a person expressly authorized by statute, who may sue without joining with him the person for whose benefit it is prosecuted, that is, the real party in interest; and officers may sue and be sued in such name as authorized by law.¹ A trustee of an express trust only is noticed in this section.² The New York code has defined a trustee of an express trust as a person with whom, or in whose name, a contract is made for the benefit of another;³ and it was not intended to limit it to a particular class, but rather to enlarge its sense.⁴ Under this provision the beneficiary of a contract, or he for whom it was made, though not named therein, may bring an action thereon in his own name as the real party in interest.⁵ And this is so where the contract is a verbal one.⁶ The provision is plain, and it should be an easy matter to determine what cases fall within it. It does not apply or extend to those who are only indirectly or incidentally benefited.⁷ Where property is conveyed to trustees of a corporation for its benefit, the corporate body may bring an action with respect thereto.⁸ It will include a collector of a claim,⁹ a loan agent,¹⁰ a person to whom a note and mortgage are given for the benefit of others,¹¹ or one who holds the legal title to a cause of action as agent or trustee,¹² or an auctioneer,¹³ or a factor,¹⁴ or an insurance broker holding a policy for himself and others, though the only one named,¹⁵ or a part owner of

¹ O. Code, sec. 499.

² See ch. 35, Executors and Administrators, sec. 548; ch. 45, Infants, sec. 672.

³ N. Y. R. S., sec. 113 (449).

⁴ Weaver v. Trustees, 28 Ind. 112 (1867).

⁵ Emmitt v. Brophy, 42 O. S. 82; Miller v. Florer, 15 O. S. 148; Gildersleeve v. Burrows, 24 O. S. 204; Stevens v. Flannagan, 131 Ind. 122; Crumbaugh v. Kugler, 3 O. S. 544, 549; Bagaley v. Waters, 7 O. S. 359, 367; Trimble v. Strother, 25 O. S. 378, 381; Thompson v. Same, 4 O. S. 333; Carnahan v. Tousey, 93 Ind. 561; Leake v. Ball, 116 Ind. 214; Hewitt v. Young, 82 Ia. 224; Ellis v. Harrison, 104 Mo. 270; 16 S. W. Rep. 198 (1891); Anthony v. Herman, 14 Kan. 494; Brenner v. Luth, 28 Kan. 581.

⁶ Grant v. Pendery, 15 Kan. 236;

Harrison v. Simpson, 17 Kan. 508; Center v. McQueston, 18 Kan. 476; Piano Mfg. Co. v. Burrows, 40 Kan. 361.

⁷ Burton v. Larkin, 36 Kan. 246.

⁸ Church v. Branham, 90 Cal. 22; 27 Pac. Rep. 60 (1891).

⁹ Noe v. Christie, 51 N. Y. 270.

¹⁰ Consolidated B. Wire Co. v. Purcell, 48 Kan. 267 (1892); Stillwell v. Hamm, 97 Mo. 579 (1888).

¹¹ Lundberg v. Elevator Co., 42 Minn. 37; 48 N. W. Rep. 685 (1889); Hays v. Gaslight and Coal Co., 29 O. S. 330.

¹² Cassidy v. Woodward, 77 Ia. 354, and cases cited; Cottle v. Cole, 20 Ia. 481; Rice v. Savery, 22 Ia. 470.

¹³ Minturn v. Main, 7 N. Y. 220.

¹⁴ Ladd v. Arkell, 37 N. Y. Super. 35.

¹⁵ Insurance Co. v. Wilson, 6 O. S. 553.

property in whose name a policy of insurance is issued for the benefit of all owners,¹ or a guest at an inn who has in his possession property belonging to another which he leaves with the innkeeper,² or a trustee in a deed of trust to secure a debt,³ or the payee of a note who is acting as a trustee of another, whether the beneficiary be dead or alive,⁴ or an agent of a syndicate to whom a note is made payable,⁵ or one who deposits money of his principal in bank as agent,⁶ or an agent of a foreign corporation to whom a subscription note is made payable as agent.⁷ But an agent who makes a contract in the name of his principal is not in any sense a person with whom a contract is made, and can not sue thereon.⁸ Nor can he sue in his own name upon an implied liability to his principal,⁹ although as shown by the foregoing illustrations he may sue upon express contracts made for the benefit of another,¹⁰ in which case he need not join his beneficiary.¹¹ But members of a township board of health are not within the provision under consideration so as to enable them to sue in their own names to recover money for the use of the board.¹² And in an action against a trustee for a debt for which he is personally liable, the beneficiaries are not necessary parties.¹³

Sec. 10. Action by officers.—Officers may sue and be sued as is provided by law.¹⁴ Commissioners of a county, when a cause of action for the use of the county arises out of a subject-matter within their control, may sue thereon in their own name.¹⁵ They are not the proper parties to bring suit on the bond of a

¹ Knight v. Insurance Co., 26 O. S. 664.

² Arcade Hotel Co. v. Wiatt, 1 O. C. C. 55; s. c., 13 W. L. B. 294; Kellogg v. Sweeney, 1 Lans. 397.

³ Gardner v. Armstrong, 31 Mo. 535.

⁴ Beck v. Haas, 31 Mo. App. 180 (1888); Goodnow v. Litchfield, 63 Ia. 275.

⁵ Coffin v. G. R. Hydraulic Co., 136 N. Y. 655; 32 N. E. Rep. 1076.

⁶ McLaughlin v. Bank, 43 N. W. Rep. 715 (Dak., 1889).

⁷ Considerant v. Brisbane, 22 N. Y. 389 (1860).

⁸ Ferguson v. McMahon, 52 Ark. 433 (1889).

⁹ Palmer v. Railroad Co., 11 N. Y. 376-390.

¹⁰ Ruckman v. Pitcher, 20 N. Y. 9.

¹¹ Considerant v. Brisbane, 22 N. Y. 389, and cases cited generally *supra*.

¹² Sanderson v. Gordo Co., 80 Ia. 89; 45 N. W. Rep. 560.

¹³ Connolly v. Lyons, 82 Tex. 664.

¹⁴ O. Code, sec. 4995.

¹⁵ Commissioners v. Noyes, 35 O. S. 201; Shanklin v. Commissioners, 21 O. S. 575; Overseers of Poor v. Same, 18 Johns. 407; Supervisors v. Stimson, 4 Hill, 136. Suit to recover money due county (15 O. 15); and for expenses paid in repairing a bridge injured by a railroad company. Perry Co. v. Railroad Co., 43 O. S. 451; R. S., sec. 863.

county treasurer.¹ They are not necessary parties to be joined in an action on a recognizance brought in the name of the state;² nor can they be sued in their corporate capacity for damages for private injury to property, caused by their negligence,³ or held personally responsible,⁴ unless so provided by statute. A master commissioner may sue to recover the purchase-price of real estate sold by him,⁵ and township trustees may sue to recover a statutory penalty for obstructing a highway,⁶ or for the use and occupation of township lands;⁷ or a sheriff may prosecute an action against a surety on a replevin bond,⁸ or for conversion of attached property,⁹ or for the price of property sold at judicial sale,¹⁰ except after confirmation and assignment of his right of action to the creditor.¹¹ But a township clerk can not sustain an action against a township treasurer for money had and received.¹² When an action is brought by an officer it should be in his individual name, with his official designation and averments of official character.¹³

Sec. 11. When wife may defend.—When husband and wife are sued together, the wife may defend for her own right; and if the husband neglect to defend, she may also defend for his right.¹⁴ By recent changes in the status of a married woman, she may sue and be sued, the same as if unmarried. The only portion of the provision of the code just stated applicable is, that she may defend for her husband when he neglects so to do,¹⁵ in which case she may make a complete defense as to both.¹⁶

Sec. 12. Insane persons and infants.—The action of an insane person must be brought by his guardian; the action of an infant by his guardian or next friend. When brought by next friend it must be for the benefit of the infant, otherwise the court may dismiss the suit or substitute the guardian, or any person, as the next friend.¹⁷ A defense by an insane person must be by

¹ Hunter v. Commissioners, 10 O. S. 515; R. S., sec. 1133. See *ante* sec. 8c. See R. S., sec. 845; 78 O. L. 121. To establish boundaries, R. S., sec. 808.

² Gamble v. State, 21 O. S. 183.

³ Commissioners v. Mighels, 7 O. S. 109; Grimwood v. Commissioners, 23 O. S. 600.

⁴ Thomas v. Wilton, 40 O. S. 516; Gregory v. Small, 39 O. S. 346; Steward v. Southard, 17 O. 402; Ramsey v. Riley, 13 O. 157.

⁵ Mayer v. Wick, 15 O. S. 548.

⁶ Higgins v. Grove, 40 O. S. 521.

⁷ Wilson v. Trustees, 8 O. 174-9.

⁸ Greer v. Howard, 41 O. S. 591; Cheseldine v. Mathers, 2 Disn. 592.

⁹ Schaeffer v. Marienthal, 17 O. S. 183.

¹⁰ Galpin v. Lamb, 29 O. S. 529; McKee v. Lineberger, 69 N. C. 217.

¹¹ Mayer v. Wick, 15 O. S. 548.

¹² Mount v. Lakeman, 21 O. S. 643.

¹³ Pomeroy's Code Rem., sec. 179. See chapter on Taxation.

¹⁴ O. Code, sec. 4997.

¹⁵ R. S., sec. 3112 et seq.

¹⁶ Lowe v. Redgate, 42 O. S. 329.

¹⁷ Code, sec. 4998.

his legally appointed guardian, or by a trustee, for the suit appointed by the court. If he becomes insane after the action is instituted, it will thereafter be prosecuted or defended by his guardian or trustee.¹ Such a person, though incapable of defending for himself, is still civilly liable, and should be brought into court before any action can be taken,² although a judgment rendered against him without the intervention of a guardian or trustee is not necessarily void.³ The guardian of a lunatic must sue in his own name.⁴

The defense of an infant must be by a guardian for the suit, who may be appointed by the court or judge in which the action is prosecuted.⁵ It is not proper to appoint a guardian *ad litem* until after service of the summons in the action.⁶ The appointment of a guardian *ad litem* is for the purpose of defense, after appearance has been effected by service of process on the infant.⁷ If the infant is fourteen years of age, the appointment may be made upon his application; if he is under that age, or if he neglect to apply within twenty days after service, the appointment may be made on the application of the plaintiff, or a friend of the infant.⁸

Sec. 13. Joinder of parties plaintiff.—"All persons having an interest in the subject-matter of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided," is the provision of the code.⁹ It is otherwise provided that "if the consent of one who should have been joined as plaintiff cannot be obtained, or, if he is insane, and the consent of his guardian cannot be obtained, or he has no guardian, and that fact is stated in the petition, he may be made a defendant."¹⁰ Who may or should be joined as parties plaintiff depends entirely upon the nature of the obligation or subject-matter. If the action be one *ex contractu*, and the obligation is joint, then all the parties should be joined. If it is severable, then possibly one of the parties might maintain a suit. The rules governing this matter have not been changed under the reformed procedure, but it remains just as it was, and is governed by the fundamental rules and principles of substantive law determining the rights and obligations of parties.

¹ O. Code, secs. 5000-2.

² *Sturgess v. Longworth*, 1 O. S. 545, 550.

³ *Johnson v. Pomeroy*, 31 O.S. 247.

⁴ *Wageman v. Brown*, 1 W. L. J. 454.

⁵ Code, sec. 5003.

⁶ R. S., sec. 5004; *Keys v. McDonald*, 1 Handy, 287.

⁷ *Moore v. Starks*, 1 O. S. 369.

⁸ R. S., sec. 5004.

⁹ O. Code, sec. 5005.

¹⁰ O. Code, sec. 5007.

The only division of obligations that can be made, which prevailed also at common law, was into joint and several. Then, as already stated, if the obligation is joint in its nature, all interested in the recovery must join, and the defendant would have the right to so insist. But if the interest of one of the obligees was capable of separation so that the one who has to respond to the obligation will not in any wise suffer, one party may maintain the suit.¹ Persons whose interests depend upon the same right, and who may be affected in the same manner, may be joined.² If all the parties plaintiff are not joined that should be, and it so appears upon the face of the pleadings, a demurrer for defect of parties would lie.³

A cause of action arising from an injury to property, real or personal, may exist jointly in several owners. There may be joint ownership in either class of property, in which case all must join in the action for the injury.⁴ An eminent author has well said that: "It should be carefully observed . . . that the provisions in the various codes relating to parties plaintiff are not so full, minute, and express as those relating to parties defendant. Even in those state codes where the common-law distinctions between joint, joint and several, and several liabilities are utterly abolished, and the practical requirements as to the union or severance of parties defendant based upon them are wholly swept away, there is no corresponding express legislation as to the distinctions between joint and several rights and the union or severance of plaintiffs."⁵ The section of the code under consideration does not speak in terms of obligations joint or several, but merely provides that all having an interest may be joined as plaintiffs. Another section of the code provides that: "Judgment may be given *for* or against one or more of several plaintiffs, etc."⁶ But it has been held that the common-law rule as to commencing a suit upon an obligation confessedly joint is not affected by this latter provision.⁷ The code has not changed the old law as to joint rights, but has merely incorporated therein the rule which prevailed in equity, that where the consent of one person united in interest could not be obtained he could be made a defendant.⁸ While, therefore, we say that the

¹ Pomeroy's Code Rem., sec. 185.

² Creed v. Bank, 1 O. S. 6; Catlin v. Wheeler, 49 Wis. 519.

³ Code, sec. 5062; Pomeroy's Code Rem., sec. 188.

⁴ Pomeroy's Code Rem., secs. 189 and 190.

⁵ Pomeroy's Code Rem., sec. 185.

⁶ Sec. 5311.

⁷ 14 O. S. 291.

⁸ Pomeroy's Code Rem., sec. 197; Daniel's Ch. Pr. 192.

old rules as to instruments confessedly joint are not changed, still it would seem that the equity rule allowing one who should be joined as plaintiff to be joined as defendant ought to work out the rights of parties.¹

Sec. 14. Joinder of parties defendant.—Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved.² There are necessary and proper parties. Where a party will be directly affected by a decree he is an indispensable or necessary one.³ Proper parties are those who, though not absolutely essential, ought to be made parties so that all interests may be determined. The important question to decide in making parties defendant is whether an obligation is joint or joint and several. In the absence of any special words so indicating, a liability is usually regarded as joint, and a several one, where the words "we jointly and severally promise" are used.⁴ These questions will be found in special chapters. It may here be stated that one or more of the persons severally liable on an instrument may be included in the same action thereon.⁵ But where the only remedy is a joint suit against obligors, it is error to render judgment against one and allow the action to proceed against others,⁶ although such a course may be taken where it appears from the pleadings that a several judgment will be proper.⁷ This abrogates the common-law doctrine that the death of one of several joint makers of an obligation extinguishes all remedy at law against his estate.⁸

The code commissioners said with reference to this section that it "will enable a plaintiff to exhaust in one suit his remedies against a surviving partner and the representative of a deceased partner. It will also apply to many other cases. These two rules will very often save the necessity of several suits to settle one matter in controversy which can as well be settled in one suit."

¹ See *Smetters v. Rainey*, 14 O. S. 287.

² O. Code, sec. 5006.

³ *Board v. Walbridge*, 38 Wis. 179-88; *Williams v. Bankhead*, 19 Wall. 563.

⁴ See *Pomeroy's Code Rem.*, sec. 271, and see chapter on Bills and Notes.

⁵ O. Code, sec. 5009.

⁶ *Aucker v. Adams*, 23 O. S. 543; *Daugherty v. Walters*, 1 O. S. 201-2.

⁷ *Hempey v. Ransom*, 33 O. S. 312; *Oliver v. Gilmore*, 52 Fed. Rep. 562.

⁸ *Burgoyne v. Ins. Co.*, 5 O. S. 586; *Weil v. Guerin*, 42 O. S. 302; see *Pomeroy's Code Rem.*, sec. 280, for old rule.

Sec. 14a. Same continued—Kinds of obligations—Contractual.—The rules as to joinder of parties defendant, and the construction to be placed upon the code, are much the same as those applicable to plaintiffs discussed in the last section, it all depending upon the nature of the obligation and the fundamental principles of substantive law governing liabilities.

All liabilities must arise *ex contractu* or *ex delicto*. Those founded upon contract may be joint or joint and several. "When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general, and applies to undertakings, obligations and promises of all possible descriptions."¹

The code permits judgment to be rendered against one or more of several defendants in an action against several defendants, leaving the action to proceed against others whenever a several judgment is proper.² This is limited to several obligations, as such a judgment could not be rendered and the action proceed against one of two defendants on a *joint* note.³ But if in an action upon an alleged joint contract it turns out upon trial that it is not, but that only one or more of the defendants are liable on the contract, then of course a several judgment may be properly taken against one or more.⁴

The other class of obligations, those *ex delicto* and those who may be made parties defendant in actions thereon, are discussed in the next section.

Sec. 14b. Same continued—Actions ex delicto.—The rules prevailing at common law with reference to the liability of joint tort-feasors, and the consequent rules as to parties to actions *ex delicto* are not changed under the code.

Several persons may by concerted action commit an act against another under such circumstances that they may properly all be charged with the responsibility of the act, and all equally compelled to respond in damages.⁵ They are joint tort-feasors. Although the wrong is joint, yet it is also several. The injured person has a concurrent remedy against them severally; he may recover from one or all of the joint trespassers, pursuing his

¹ Pomeroy's Code Rem., sec. 277, taken from 1 Chitty's Plg., p. 42, and cases cited; 1 Wm. Saund. 153n (1).

² O. Code, sec. 5312.

³ Carr v. Beckett, 1 O. C. C. 72; Ancker v. Adams, 23 O. S. 543. If

judgment is rendered against one, that ends the matter and relieves the other; 1 O. C. C. 72; see Smetters v. Rainey, 14 O. S. 287.

⁴ Roby v. Rainsberger, 27 O. S. 674.

⁵ Cooley on Torts, p. 153, and cases cited.

remedy against one or all; he may elect to sue such only of the joint wrong-doers as may seem to him principally liable, as there are certain instances where the liability will be proportioned.¹

Sec. 15. One suing for all.—"When the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."² The general rule that all parties must be united is only departed from when it is inconvenient or impossible to comply with it.³ When parties falling under this rule are divided in classes, the one suing can only act for those of his own class.⁴

This provision being an equity rule must be construed according to equitable principles, but applies now to both legal and equitable actions. The section purports to define two classes of persons, to wit: (1) when the question is one of common or general interest, and (2) when the parties are so numerous that it is impracticable to bring them all before the court. But undoubtedly both classes would apply equally to the average run of cases.

There would seem to be no objection to representatives of two distinct, different classes of persons uniting in the same action where the question is one of common or general interest to both

¹Sherman, J., in *Wright v. Lathrop*, 2 Oh. 33, 52, says: "That each joint trespasser is answerable for the acts of all, and that the plaintiff may pursue his remedy against one or all, is unquestioned. He is entitled to compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are quasi collateral security for each other until the plaintiff has obtained satisfaction. It would seem to follow, from this doctrine, that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another. * * * * If a joint action be brought against all the trespassers they may sever in their pleas." See *Gardner v. Friederich*, 49 N. Y. S.

1077. If satisfaction is obtained as to any one, even though intended only to be a release as to that one, the rest are released. *Ellis v. Bitzer*, 2 Oh. 89.

There can be no contribution between the defendants. *Acheson v. Miller*, 18 O. 1. See *Cooley on Torts*, 153-162.

²O. Code, sec. 5008; *Upington v. Oviatt*, 24 O. S. 232; *Quinlan v. Myers*, 29 O. S. 500-8. See ch. 86, Taxes, sec. 1175; ch. 83, Stock & S., sec. 1151; *Alexander v. Gish*, 88 Ky. 13 (1898), holders of county bonds.

³*Board v. Walbridge*, 38 Wis. 188.

⁴*Quinlan v. Myers*, 29 O. S. 500-8; *Macon R. R. Co. v. Gibson*, 85 Ga. 2; *Pomeroy's Code Rem.*, sec. 388; 1 *Daniell's Ch. Pr.* 234-7; *Hawes on Parties*, sec. 92; *Story's Eq. Pl.*, sec. 94.

classes, and this has received the sanction of courts,¹ where a creditor and stockholder joined as plaintiffs in an action for the benefit of all the corporate creditors and stockholders.

How or in what particulars a question may be one of common or general interest to many persons must depend upon circumstances to be determined by the court from the facts presented. It is only necessary to keep the classes of persons distinct. There is no particular number of persons required to enable one to sue on behalf of others under this section; this class being distinct from the other, those having a common interest need not be so numerous as that it would be impracticable to bring them into court. And where the person suing represents a class that is so numerous as to be impracticable to bring them into court, he is entitled to maintain the suit solely because of the fact that the persons whom he represents are so numerous, and they do not have to have a common interest in the question.²

To enable persons to maintain a suit under this section, on behalf of others, it is necessary that their relations to each other are such that they might all join in one action.³

All the facts sufficient to show the relation of the parties and to place them in a position to maintain the action in this form, should be alleged in the petition.⁴

Where the facts stated in setting forth the cause of action sufficiently show the common interest, or the impracticability of bringing parties into court, that, with the introductory allegation that the suit is brought by the plaintiff on his own behalf and on behalf of others, with a direct allegation of the fact of the common interest, ought to be sufficient.

Sec. 15a. Same continued—Illustrative cases.—Under the rules and principles stated in the last section fall an action by a creditor to enforce the statutory liability of stockholders of a corporation,⁵ or an action by one lienholder on behalf of himself and others to foreclose a mortgage,⁶ or an action by one taxpayer

¹ *Miesse v. Loren*, 5 Oh. N. P. 307.

² *McKenzie v. L'Armoureaux*, 11 Barb. 516.

³ *Reid v. The Evergreens*, 21 How. Pr. 319.

⁴ *Bardstown & L. R. Co. v. Metcalf*, 4 Metc. 199 (Ky.). It has been held, however, that this sufficiently appears from an introduction in the complaint describing the plaintiffs

as "suing in behalf of themselves and of all others, etc." without a direct allegation that they are suing for the benefit of the whole. *Abbott's Brief on Pldgs.*, sec. 299; *Cochran v. American Opera Co.*, 20 Abb. N. C. 114; *Dennis v. Kennedy*, 19 Barb. 517.

⁵ *Umsted v. Buskirk*, 17 O. S. 114.

⁶ *Carpenter v. Canal Co.*, 35 O. S. 307.

on behalf of himself and others similarly interested to restrain the collection of an illegal tax.¹

Sec. 15b. Persons severally liable. "One or more of the persons severally liable on an instrument may be included in the same action."² At common law a joint action could only be brought to enforce a joint liability. This provision of the code was enacted to enable the holder of an obligation upon which there are persons severally liable, but whose liability is not the same, although upon the same instrument, to unite all such persons as parties defendant.³ This section originally read differently, allowing "any or all" persons severally liable to be included in an action on a several liability. A creditor in pursuance of this may sue each singly, or may sue all together;⁴ and the creditor may do under this provision what could not be done at common law; he may join in the same action the survivor or survivors, and the personal representative of a deceased obligor, whether the contract is in terms joint and several, or made so by the provisions of the administration law, upon death of a joint obligor, which authorizes a several judgment to be rendered against each, according to the nature of their respective liabilities.⁵

And so may the guarantor of a subscription and the subscriber himself be included on the same action;⁶ or the guarantor and maker of a note.⁷

The holder of such an obligation may elect to sue one only; and if so, it is not competent for a defendant surety by cross-petition, or otherwise, to bring in his principal and have the relation certified under the statute.⁸

Sec. 15c. How partners may sue and be sued.—There are two kinds of partnerships to be noticed. One where the name

¹ Upington v. Oviatt, 24 O. S. 232.

² O. Code, sec. 5009.

³ See Kautzman v. Weirick, 26 O. S. 332.

⁴ Decker v. Trilling, 24 Wis. 610; Burgoyne v. Ins. & Trust Co., 5 O. S. 586.

⁵ Burgoyne v. Ludlow, 5 O. S. 586. At common law, the death of one of the joint makers of an obligation extinguished all remedy *at law* against his estate; and no action at law could be maintained against his personal representative, either jointly with the survivor or by a separate suit. In such case relief had to

be sought in equity, but only on condition that the remedy against the survivor proved fruitless. This rule of the common law was abrogated by two sections of the code, one the Probate Code (6102), making the estate of the deceased obligor liable in the same manner "as if the contract had been joint and several," and the other by the section under consideration. *Id.* See Weil v. Guerin, 42 O. S. 302.

⁶ Neil v. Board, etc., 31 O. S. 15.

⁷ Kautzman v. Weirick, 26 O. S. 330.

⁸ Wilkins v. Bank, 31 O. S. 565.

will indicate who its members are, the other designated by a fictitious name, not disclosing the names of the persons composing it. By favor of statute a domestic partnership may sue by its ordinary firm name without stating the names of its members.¹ This is in derogation of the common law. It is necessary, therefore, to aver in the pleading that the plaintiff or defendant, as the case may be, is a partnership formed for the purpose of doing business within the state. If the plaintiff does not make this averment, his pleading will be subject to a special demurrer for want of capacity to sue.² The common-law rule will apply to a foreign partnership, it not being permissible for it to sue by its ordinary firm name. Suit by or against such a partnership must be in its individual names.³

What are known as fictitious partnerships, those in which the names of the members do not appear in the firm name, must comply with the so-called registration law, and must aver in the pleading that they have so complied with the law in this behalf.⁴

Sec. 15d. When action shall not abate.—Upon the marriage of a female who is a party, the action does not abate, but it is necessary that the husband be joined therein, he may be made a party with his wife; upon the disability of a party, the court may allow the action to continue by or against his representative, or successor in interest.⁵

Sec. 15e. Transfer of interest pending suit.—Upon any transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him.⁶ If the plaintiff transfers all his interest in an action during its pendency the action may proceed in the name of such plaintiff, and the transfer is no defense to the action.⁷

Sec. 16. Ordering parties brought in.—The court is authorized to determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when this can not be done without the presence of other parties, the court may order them brought in, or may dismiss the action without prejudice.⁸ If the

¹ R. S., sec. 5011.

² *Haskins v. Alcott*, 13 O. S. 210. See chap. 69, sec. 967, *post*. Also sec. 46g, where this is more fully discussed.

³ *Brownson v. Metcalf*, 1 Handy, 188.

⁴ See sec. 46h, *post*, where this is fully discussed.

⁵ O. Code, sec. 5012. See as to Revivor of Actions, sec. 1107.

⁶ O. Code, sec. 5012.

⁷ *Lowry v. Anderson*, 57 O. S. 179.

⁸ O. Code, sec. 5013.

rights of the parties not before the court must be determined before the rights of those who are already parties can be adjusted, then it becomes an absolute judicial duty.¹ But if it is not essential that other parties be brought in, then it can not be done against the will of the plaintiff.²

Sec. 16a. Person claiming an interest in property made party.—In an action for the recovery of real or personal property a person claiming an interest in the property may, on his application, be made a party.³

Sec. 17. Remedy for misjoinder of parties.—The remedy for a misjoinder of parties pointed out by the code is by demurrer;⁴ but objection to misjoinder or non-joinder not appearing on the face of the petition, according to some authorities can not be raised by a general demurrer, but must be by answer.⁵ The demurrer to raise the question of parties must be special;⁶ and unless objection is made by demurrer or answer, it is waived.⁷

¹ Pomeroy's Code Rem., sec. 419.

² Chapman v. Forbes, 123 N. Y. 532; 29 N. E. Rep. 3; Pomeroy's Code Rem., sec. 420.

³ O. Code, sec. 5014.

⁴ O. Code, sec. 5062. See sec. 98, *post*.

⁵ Crenshaw v. Ullman, 20 S. W. Rep. 1077 (Mo., 1893); McFadden v. Schill, 84 Tex. 77 (1892); Williams v. Bradbury, 9 Tex. 487; Railroad Co. v. La Gierse, 51 Tex. 200. A demurrer for misjoinder will not lie unless the petition shows the defect on its face. Carico v. Moore, 29 N. E. Rep. 928 (Ind., 1892); Tatum v. Rosenthal, 30 Pac. Rep. 136 (Cal., 1892). One party can not demur to a petition on the ground that another party has been improperly

joined with him as a defendant. Powers v. Bumcratz, 12 O. S. 273.

⁶ Whipperman v. Dunn, 124 Ind. 349; 24 N. E. Rep. 1045 (1890).

⁷ Leucke v. Tredway, 45 Mo. App. 507; Hurd v. Simpson, 47 Kan. 245; 26 Pac. Rep. 465 (1891); Ostrander v. Weber, 114 N. Y. 95; Christian v. Bowman, 49 Minn. 99; 51 N. W. Rep. 663 (1892). Where a defect appears on face of petition it is waived unless demurred to. Bank v. Gilpin, 105 Mo. 17; 16 S. W. Rep. 524 (1891); Melsheimer v. Hommel, 15 Colo. 475; 24 Pac. Rep. 1079; Railroad Co. v. Kindred, 43 Kan. 134; 23 Pac. Rep. 112; Coulson v. Wing, 42 Kan. 507. See sec. 106 *post*.

CHAPTER 3.

JOINDER OF ACTIONS.

Sec. 17a. The common law.

18. Joinder of actions generally.
19. A single cause of action.
20. Separately stating and numbering causes of action.
21. Consistency in causes united.
22. Single recovery upon two grounds further considered.
23. Same transaction, or transaction connect with same subject of action.
24. Same transaction continued—Actions held joinable.

Sec. 25. Same transactions continued—Actions held not joinable.

26. Contracts, express or implied.
27. Injuries to person or property.
28. Injuries to character.
29. Recovery of personal property with damages.
30. Recovery of real property with damages.
31. Claims against trustees.
32. Actions to enforce liens.
33. Remedy for misjoinder.
34. Venue and parties in action joined.

Sec. 17a. The common law.—That we may gain a complete understanding of this most important branch of pleading, a study should be made of the common-law rules governing the matter. It is not an easy matter to ascertain the correct common-law doctrine governing joinder. One might at first suppose that the subject was a creature of the code, brought about by the union of legal and equitable causes, but this is not so. There were certain actions at common law which could be joined. The right to join actions depended chiefly upon the form of the action rather than upon the subject-matter,¹ and as forms are abolished under the code, the right of joinder depends not upon the form but entirely upon the subject-matter. But there were fundamental principles bearing upon this matter at common law other than mere form. The most generally expressed common-law rule is that whenever the same plea could be pleaded and the same judgment could be given on all the counts in the declaration, or whenever the counts were of the same nature and the same judgment could be given on all of them, as debt upon bond and upon simple contract, they could be joined.²

Sec. 18. Joinder of actions generally.—The code³ provides that several causes of action may be united in the same petition, whether they are such as have formerly been denominated legal or equitable, or both, when they come within the provision of any of the enumerated classes, which will be treated separately in their order in this chapter.

A plaintiff having separate, distinct and independent claims can not be compelled to unite them in a single action.⁴

Causes of action to be joined must be existing and not prospective.⁵

Sec. 19. A single cause of action.—The general rule is that each contract or wrong constitutes but one cause of action, and that where there are several breaches, or losses, there is but one cause of action.⁶

It is a rule too well understood to warrant the citation of

¹ *Nimocks v. Hicks*, 17 O. 596; 1 Chitty Pl., p. 222.

² Consult Code Comrs. Rep., p. 48; Hepburn's Historical Devel. of Code, secs. 50, 51, 126, 232-234.

³ Sec. 5019.

⁴ *Merrill v. Lake*, 16 O. 373.

⁵ *Weinland v. Cochran*, 9 Neb. 480.

⁶ *Bliss on Code Pldg.*, sec. 118; *Commissioner v. Plumb*, 20 Kan. 147.

authority, that a party having but one demand or cause of action cannot divide and split it and bring suits upon each, but is limited to one recovery. He may elect to sue upon one ground, or, if there be several reasons or grounds for recovery, they may be united, but the single claim cannot be split.¹

While it is well settled that an indivisible demand cannot be separated and collected by several actions, yet where there is an agreement between parties that an account for goods sold for each month shall be due and payable, such monthly account constitutes a separate demand for which recovery may be had, and will not operate as a bar to an action for another month.²

In an action for false representation in the sale of sheep, a petition containing averments that representations were made that the sheep were sound when they were not, and also that they were turned into a field with other sheep, thereby infecting other sheep and injuring the pasture, constitutes but one cause of action;³ and so with a charge that a defendant entered a dwelling and removed the roof, thereby exposing the family and property to the weather;⁴ or a claim for statutory damages and costs of protest on a bill of exchange;⁵ or items on a running account for merchandise;⁶ or a claim for loss to a person of his wife's services and expenditure by him of means and labor in healing and caring for himself and children, being the result of the same negligent act;⁷ or different acts of fraud in obtaining payment of many different fraudulent claims at different times in pursuance of an alleged conspiracy;⁸ or in conversation in which slanderous

¹Dulaney v. Payne, 101 Ill. 325 (1882);
8 W. L. B. 96; Upjohn v. Ewing,
2 O. S. 13; Railroad Co. v. Nichols,
54 Ill. 464; Hazard Powder Co. v.
Viergutz, 6 Kan. 471; Bliss on Code
Pldg., secs. 118-165. For a more full
discussion see Bendernagle v. Cocks,
19 Wend. 207; Secor v. Sturgess, 16
N. Y. 548; Mills v. Garrison, 3 Keyes,
40.

²Beck v. Devereaugh, 9 Neb. 109.
³Parris v. Hightower, 76 Ga. 631.

⁴Wilcox v. McCoy, 21 O. S. 655.

⁵Brown v. Lake, 39 O. S. 64.

⁶Summit Co. Bank v. Smith, 1
Handy, 575.

⁷Stevens v. Lockwood, 13 Wend.
646.

⁸Railroad Co. v. Chester, 57 Ind.
297.

⁹People v. Tweed, 68 N. Y. 194;
5 Hun, 358.

words were used;¹ or a claim for services, a portion of which are rendered to a firm of which the defendant is the surviving partner, and the other portion under the same contract to the defendant alone;² or a claim for damages for the wrongful dismissal of a person from employment, and for wages earned during the term of employment;³ or an action to recover instalments of an illegal and void assessment paid,⁴ — may all be treated as a single cause of action. But a claim for damages resulting from injuries to personal or real estate occurring prior to the assignment thereof to an assignee, and a claim for damages arising from the same source subsequent to such an assignment, constitute a separate cause of action, and should be separately stated and numbered;⁵ and so a petition which states a contract for the sale and delivery of goods to be delivered in lots at different times, alleging two breaches, one that those delivered did not correspond in quality with the terms of the contract, the other, that the portion contracted for were not delivered at all.⁶

Sec. 20. Separately stating and numbering causes of action.— When the petition contains more than one cause of action, each cause must be separately stated and numbered.⁷ Artificial pleading having been abolished, a plaintiff having but one cause of action should state the facts without repetition. He is not permitted to state them in different form, or to so subdivide them as to present two or more distinct and fictitious causes of action. The facts should be set forth as they actually occurred, and the same cause of action cannot be stated in different forms as so many distinct causes of action.⁸

The object of this provision is not only to preserve as far as practicable the legal distinction between causes of action

¹ *Cracraft v. Cochran*, 16 Ia. 301.

² *Butler v. Kirby*, 58 Wis. 188.

³ *Perry v. Dickerson*, 85 N. Y. 345.

⁴ *Higgins v. Pelton*, 4 W. L. B. 751.

⁵ *Hall v. Railroad Co.*, 1 Disn. 58.

⁶ *Work v. Mitchell*, 1 Disn. 506.

⁷ O. Code, sec. 5061.

⁸ *Sturges v. Burton*, 8 O. S. 215; *Ferguson v. Gilbert*, 16 O. S. 88; *Bliss on Code Pldg.*, secs. 118, 119; *Pomeroy's*

R. & R. 340; *Cincinnati, N. O. & T. P. Ry. v. Bank*, 1 Ohio C. C. 303.

Duplicate statements for the same cause of action are not absolutely prohibited; they are permissible where the party cannot anticipate what the evidence may be, so as to go to trial on a single statement. *Cramer v. Oppenstein*, 16 C. C. 504.

in a petition, but to enable a defendant to answer fully, definitely and clearly, that the facts alleged may be denied or admitted, and the court readily understand the principal points in controversy.¹ The causes of action which are required to be specifically stated and numbered are such as by law will entitle the plaintiff to prosecute separate actions therefor.² Where a single cause of action is stated separately or in two counts, as at common law, the plaintiff may be required by motion to elect upon which he will proceed, as he cannot frame one count so as to meet one construction, and a second count to meet another view;³ or the court may upon objection treat the additional action as mere surplusage.⁴ But where two causes of action are properly joined in a pleading, but are not separately stated or numbered as required by law, objection should be made thereto by motion to make the petition definite and certain by separately stating and numbering the causes of action. A defendant who does not so object, but answers the two causes and proceeds to trial thereon, is considered to have waived the informality. He cannot on trial, under a general denial, insist upon a ground of defense which, to have been available to him, he should have objected to uniting the causes of action without properly stating and numbering them.⁵ This irregularity can be reached only by motion,⁶ although the court may upon its own motion require a plaintiff to separately state and number several causes of action contained in one petition.⁷ A demurrer is not the proper remedy to

¹ *Works v. Mitchell*, 1 Disn. 506.

² *Sturges v. Burton*, *supra*; *Globe Rolling Mill Co. v. King*, 2 C. S. C. R. 21; *Maxwell's Code Pldg.*, p. 342; *Pike v. Van Wormer*, 5 How. Pr. 171; *White v. Cox*, 46 Cal. 169; *Mooney v. Kennett*, 19 Mo. 551; *Hathaway v. Railroad Co.*, 2 W. L. M. 481; *Fern v. Vanderbilt*, 18 Abb. Pr. 72; *Lackey v. Vanderbilt*, 10 How. Pr. 155.

³ *Sturges v. Burton*, *supra*; *Fern v. Vanderbilt*, *supra*; *Hillman v. Hillman*, 14 How. Pr. 456; 11 Am. & Eng. Ency. of Law, 989; *Keens v. Gaslin*, 24 Neb. 810 (1888); *Young*

v. Edwards, 11 How. Pr. 201; *Cincinnati, etc. Ry. v. Bank*, 1 O. C. C. 203.

⁴ *Ferguson v. Gilbert*, 16 O. S. 88-91; *Bliss on Code Pldg.*, sec. 119.

⁵ *McKinney v. McKinney*, 8 O. S. 423; *Freer v. Denton*, 61 N. Y. 492; *Globe Rolling Mill Co. v. King*, 2 C. S. C. R. 21; *Sentinel Co. v. Thompson*, 88 Wis. 489; *Hathaway v. Railroad Co.*, 2 W. L. M. 481, 482; *Works v. Mitchell*, 1 Disn. 506. See as to waiver, *Lane v. Wheelwright*, 23 N. Y. Supp. 576.

⁶ *Hartford v. Bennett*, 10 O. S. 441.

⁷ *Bailey v. Hughes*, 35 O. S. 597, 601.

reach such matters,¹ and a general demurrer to each paragraph is not well taken if the pleading as a whole states a good cause of action, although the omission to state them in separate counts does not necessarily deprive the defendant of his right to demur.² Nor can an objection be by motion to dismiss the action, or for judgment upon the pleadings.³ Although a petition upon an ordinary account may contain allegations which would properly constitute two causes of action, as for money had and received, or money loaned, and for cash advanced to another or third person, the proper practice is to make a motion to require the pleader to separately state and number the causes, and not to strike the allegations from the petition as to one cause of action, and dismiss as to the other.⁴ And a petition praying for damages in the nature of a trespass, and also for an injunction in equity, should be separately stated and numbered;⁵ or an action on an account, and an action in the same petition asking the enforcement of a mechanic's lien securing the same;⁶ or an action for damages for injury to personal or real estate sustained by a lessor before conveyance to a lessee, and for damages arising after purchase by the lessee;⁷ or an action by the heirs of a deceased shareholder, in what is known as a syndicate, against trustees in whom the management is placed, charging them with mismanagement of their trust and failure to properly account for sales by them made, and also praying for a partition and an accounting;⁸ or where a petition alleges two breaches of a contract for the sale or delivery of goods, one that those actually delivered were not of the quality required by the contract, the other that a portion of those contracted for were not delivered at all.⁹ The same

¹ *Prows v. Insurance Co.*, 2 C. S. 528; *Spaulding v. Saltiel*, 18 Colo. C. R. 14; *Globe Rolling Mill Co. v. King*, 3 C. S. C. R. 21; *Bailey v. Hughes*, *supra*. *Hartford v. Bennett*, 10 O. S. 441. *Cf. Lane v. Wheelwright*, 23 N. Y. Supp. 576.

² *Wiles v. Suydam*, 64 N. Y. 173; *Lamming v. Galusha*, 17 N. Y. S. 328; *Everett v. Waymire*, 80 O. S. 308; *Shillito v. Insurance Co.*, 8 W. L. G. 296.

³ *Watson v. Railroad Co.*, 50 Cal. 645.

⁴ *McKemy v. Goodall*, 1 O. C. C. 28.

⁵ *Hathaway v. Springfield, etc. Ry. Co.*, 2 W. L. M. 481.

⁶ *Clippenger v. Ross*, 8 W. L. M. 403 (1893).

⁷ *Hall v. Railroad Co.*, 1 *Disn.* 59 (1855).

⁸ *Horner v. Meyers*, 29 W. L. B. 403 (1893).

⁹ *Works v. Mitchell*, 1 *Disn.* 506.

rule applies to defenses set up in an answer,¹ although a motion to separately state and number allegations of new matter in an answer which are without merit as matter of defense, although they do not relate to other facts therein which constitute a defense, cannot be sustained, but such new matter should be stricken out.² But a general denial in an answer and also an averment of an estoppel constitute two defenses, and should be separately stated and numbered;³ and so should a defense in an action by heirs against their father restraining him from interfering with land, on the ground that he had forfeited his rights therein, that he deeded all the premises with his own money and placed the title in their name, and also that he had subsequently redeemed the land from tax sale.⁴

Where a motion to require the plaintiff to separately state and number his causes of action is granted, merely placing numbers opposite paragraphs,⁵ or an interlineation by writing "*first* cause of action," and "*second* cause of action," over the different causes, is not sufficient.⁶ A prayer for judgment should not be asked in each cause of action, but the petition should contain a general prayer at the end, for all.⁷ Where a single cause of action is stated in several divisions, a separation of which may be unnecessary in all cases, yet essential as to some, the plaintiff cannot urge his own inaccuracy in making the separation as a ground for defeating a demurrer which adopts and follows his own division and classification.⁸ Each cause of action must be complete in itself; yet the prevailing judicial opinion is that in stating several causes of action in a petition, it may not be necessary to repeat some general averments essential to each, but that reference may be made to distinct allegations or paragraphs in a preceding cause of ac-

¹ O. Code, sec. 5071.

² *Ridenour v. Mayo*, 29 O. S. 138.

³ *French v. McConnell*, 1 Clev. Rep. 187.

⁴ *Smith v. Smith*, 1 Clev. Rep. 117.

⁵ *Weisenogle v. Powers*, 1 Clev. Rep. 141.

⁶ *Elizabeth v. Morrison*, 1 Clev. Rep. 195. The petition or answer should be rewritten, and in stating the cause of action after the first, it should be

stated: "Plaintiff for his second cause of action adopts the words in his first cause of action herein, the same as if fully here rewritten, beginning with the word '—' in the first line thereof, and ending with the word '—' in the — line thereof."

⁷ *Brainard v. Rittberger*, 2 Clev. Rep. 154.

⁸ *Victory Webb, etc. Mfg. Co. v. Beecher*, 26 Hun. 48.

tion, thereby incorporating the same in a subsequent cause of action and avoiding repetition.¹ Where a note and mortgage are pleaded in one paragraph, they may be referred to in a subsequent cause of action as having been set forth in a preceding paragraph, without repeating the same.² Where an amendment is made setting forth another and different cause of action, which in fact does not constitute a cause of action, there is no misjoinder, as it may be disregarded.³

Sec. 21. Consistency in causes united.—That causes of action may be united in one petition they must be consistent with each other, and belong to one of the classes enumerated by the code;⁴ inconsistent statements are construed against the one pleading them;⁵ but it should not be assumed that a plaintiff under a second or general count intends to set up and prove facts inconsistent with the allegations in the first count.⁶ A party may, however, prosecute as many remedies as he legally has, if they are consistent and concurrent.⁷ Legal and equitable causes, when consistent, may be united,⁸ but a plaintiff cannot be permitted in one petition to allege a

¹ *Jasper v. Hazen*, 2 N. Dak. 401; 51 N. W. Rep. 585 (1892); *Simmons v. Fairchild*, 42 Barb. 404; *Manufacturing Co. v. Beecher*, 55 How. Pr. 193. *Contra*, *Pennie v. Hildreth*, 81 Cal. 127; 22 Pac. Rep. 398; *Green v. Clifford*, 94 Cal. 49; 29 Pac. Rep. 331. "It has never been the settled law that the preliminary averments of a petition can never be made part of subsequent counts by apt and express reference and without being rewritten. Each count must stand by itself, but is not fatally defective because it incorporates, by reference, certain general averments necessary to all the counts, if the reference be so plain and explicit as to leave no doubt as to its meaning. Such a pleading is not, in general, to be commended; it may be, as it has been called, 'slovenly,' but is not bad enough to upset a judgment." *Green v. Clifford*, 94 Cal. 49. See, also, *Little v. Commissioners*, 34 N. E. Rep. 499 (Ind., 1893).

² *Yost v. Bank*, 94 Cal. 494; 29 Pac. Rep. 858. See *Mansfield v. Shipp*, 128 Ind. 55.

³ *Hawkins v. Furnace Co.*, 40 O. S. 507.

⁴ *Campbell v. McElevey*, 2 Dism. 574, 584; *Thomas v. Railroad Co.*, 97 N. Y. 245; *Henderson v. Jackson*, 40 How. Pr. 168; *Bowen v. Mandeville*, 95 N. Y. 237-9; *Hause v. Hause*, 29 Minn. 252; *Smith v. Hallock*, 8 How. Pr. 73; *Stewart v. Huntington*, 2 N. Y. Supp. 205.

⁵ *Mechanics' Sav. & Bldg. Loan Ass'n v. O'Conner*, 29 O. S. 651; *Board of Education v. Shaw*, 15 Kan. 41; *Butler v. Kaulback*, 8 Kan. 671.

⁶ *Ferguson v. Gilbert*, 16 O. S. 91.

⁷ *Bowen v. Mandeville*, *supra*; *Morgan v. Skidmore*, 55 Barb. 263; *Whitney v. Allaire*, 1 Hill, 484.

⁸ *Sturgess v. Burton*, 8 O. S. 215; *Lattin v. McCarty*, 41 N. Y. 107; *New York Ice Co. v. Insurance Co.*, 21 How. Pr. 293.

cause of action which would affirm a contract, and in another seek to rescind it;¹ nor can a forfeiture of a lease for non-payment of rent, and a judgment for the rent due, be sought in the same petition,² and the prayer in the petition may operate as an election.³

It has been held by a court of inferior jurisdiction of Ohio, that a claim cannot be alleged against a corporation for damages arising from its refusal to transfer certificates of stock upon its books, as one cause of action, and as another cause in the same petition, that, if the claim of the corporation that such stock was illegally issued, an overissue and void, be true, then the plaintiff is entitled to damages because the corporation negligently and fraudulently issued the stock and permitted its circulation, as such causes of action are inconsistent; that the question of the legality of the stock is one cause, and that of the illegality of the issue, fraud and negligence another; each requiring different pleadings and different rules of evidence, so that an election should be made upon which the plaintiff would rely.⁴ Still another court of inferior jurisdiction, in three well-considered cases arising from the same source, although different ones, took a contrary view, holding that such causes could be united and the plaintiff not required to make an election, upon the principle that the plaintiff cannot safely determine before the development of the trial what will prove to be the true nature of the transaction on the defendant's part.⁵

The court last mentioned correctly states the rule of law

¹ *Owens v. Hickman*, 2 Disn. 471; *T. P. Ry. Co.*, 16 W. L. B. 399 (1886); *Trimble v. Doty*, 16 O. S. 118, 129; 11 W. L. B. 86. Judge Force says: *Morris v. Rexford*, 18 N. Y. 552; "A plaintiff seeking to recover upon either of two causes of action, both

² *Campbell v. McElevay*, 2 Disn. 571; *Countee v. Armstrong*, 10 W. L. B. 839.

³ *Corry v. Gaynor*, 21 O. S. 277.

⁴ *Cincinnati, N. O. & T. P. Ry. Co. v. Third Nat. Bank*, 1 O. C. C. 206 (1885).

⁵ *Citizens' Nat. Bank v. C., N. O. & T. P. Ry. Co.*, 9 W. L. B. 355, opinion by Judge Force, Cincinnati superior court; *First Nat. Bank v. C., N. O. &*

either of two causes of action, both of which cannot be true, and he does not know which one is true, may state them as separate causes of action, stating them in the alternative, in one petition. A plaintiff seeking a single recovery upon two grounds, both of which may be true, may state both grounds in a single cause of action." See *Spreen v. Sandman*, 2 O. C. C. 441-3. See, also, art. 10, W. L. B. 142.

as to the right of the pleader to plead in the alternative,¹ and deemed the causes of action consistent.² This rule is extended to defenses; a defendant is allowed to make as many defenses as he may have, when they are consistent with each other.³

To compel an election between inconsistent counts the pleader should do so by motion and not by demurrer;⁴ but where the causes united are entirely inconsistent and therefore a misjoinder, a demurrer of course will lie.⁵ A court is not bound to act unless the defect is specifically pointed out.⁶

Sec. 22. Single recovery upon two grounds further considered.—The rule is well settled that where there are several grounds or alternative reasons⁷ for granting a single relief, all of which constitute but one cause of action, they may be stated in two counts and alternative relief sought. Although the rules of pleading do not allow the pleader to split his cause of action without sufficient reason, yet courts hold this rule flexible when justice requires, and justice will have no better reason for making an exception than where a plaintiff cannot safely determine which cause may be the true one, the facts being in the possession of his opponent. These are the grounds and principles upon which this doctrine rests, and it has been frequently enunciated by the courts. It has been held that, in an action for work and labor, a count setting forth an agreement to pay an agreed price is not inconsistent with another count claiming recovery upon the *quantum meruit*, and no election is required;⁸ that a contract may be sought to be set aside as illegal, or if found valid some relief consistent with that view;⁹ that in an action for recovery of loss by fire against an insurance company, one count claiming that a company in consideration of certain sums paid it had insured plaintiff, and in another, that in consideration of a sum of money paid to its

¹ Id.

² See sec. 22, *post*.

³ See sec. 78, *post*.

⁴ *Pavey v. Pavey*, 30 O. S. 300; *Peterson v. Roach*, 32 O. S. 374.

⁵ *Campbell v. McElevy*, 2 Disn. 574.

⁶ *Gilbert v. Sutliff*, 3 O. S. 129.

⁷ *Bates' Pldg.*, p. 214.

⁸ *Wilson v. Smith*, 61 Cal. 209; *Jones v. Pulmer*, 1 Abb. Pr. 442; *Stearns v. Dubois*, 55 Ind. 257; *Longprey v. Yates*, 31 Hun. 482. *Contra*, *Hewitt v. Brown*, 21 Minn. 163; *Plummer v. Mold*, 23 Minn. 15.

⁹ *Cadwallader v. Granville Society*, 11 O. 292.

duly authorized agent it had insured him, was permissible;¹ and so with a count in an action by a corporation against the maker of a note, that it was given for part of the capital stock of the company, and in another that it was given for a premium upon a policy of insurance, as an agreement to contribute ratably to the losses and expenses of the company;² or a count alleging an agreement to exchange merchandise and failure to deliver as agreed, and another averring a sale and delivery of goods by plaintiff for a certain sum;³ or it may be alleged in one count that an animal was killed through the negligence of a railroad company, and in another that it was killed where the company had the right to construct a fence but did not;⁴ or in an action for the recovery of the price and value of land sold, the petition may contain a paragraph declaring upon a special contract, and another upon *quantum valebat*, in order to meet every phase of the evidence.⁵

A court will not compel an election to be made in an action upon a petition alleging a promise by a common carrier to safely carry and deliver goods, and in another count a promise on the part of the carrier to store and preserve the goods in its warehouse at a certain station, where the goods were destroyed by fire, as it might appear that it was liable for a portion as a carrier and as to the rest as warehousemen.⁶

Separately stating two grounds for a single cause of action does not make it two causes.⁷ Alternative averments should not be made unless a good cause of action is set forth in each, as alternative relief cannot be granted unless each cause sets out a good cause of action.⁸

¹ *Velie v. Newark City Ins. Co.*, 65 How. Pr. 1; 12 Abb. N. C. 309.

² *Birdseye v. Smith*, 83 Barb. 217.

³ *Jones v. Palmer*, 1 Abb. Pr. 442.

⁴ *Pearson v. M. & S. P. R. R. Co.*, 45 Iowa, 497. See, also, generally, *Van Brunt v. Mather*, 48 Iowa, 503.

⁵ *Stearns v. Dubois*, 55 Ind. 257.

⁶ *Whitney v. Chicago & N. W. Ry.*, 27 Wis. 327. See generally on this subject, *Pomeroy's Rem. R. & R.*, sec. 576; *Bliss on Code Pleading*, sec. 120;

Boone's Pldg., sec. 17; *Williams v. Lowe*, 4 Neb. 382; *Walters v. Insurance Co.*, 5 Hun, 843; *Matthews v. Copeland*, 79 N. C. 493, suit on two bonds of officer; *Thatcher v. Haun*, 12 Iowa, 303.

⁷ *Welch v. Platt*, 32 Hun, 194.

⁸ *Mobile Savings Bank v. Burke*, 94 Ala. 125; 10 S. Rep. 328 (1891); *Summit Co. Bank v. Smith*, 1 Handy, 575; *Anderson v. Speers*, 58 How. Pr. 624; *Krutz v. Fisher*, 8 Kan. 90.

Sec. 23. Same transaction, or transaction connected with same subject of action, is the first division of actions which the code¹ provides may be united. It may here be noted what others have said, that this division is one which courts and writers have found difficult of treatment; necessarily so because its scope is broad and varied, and a decision of one case will hardly be applicable to another. One of the latest writers² states that so far as he is aware no court has attempted to define the word "transaction," with the qualification added that each case must be decided upon its own circumstances. The latter is probably true, but many attempts have been made at a definition. A very simple one is given by the supreme court of Kansas,³ saying that it probably means whatever may be done by one person which affects the rights of another, out of which a cause of action may arise. In New York,⁴ with reference to contract and a tort, it is defined as the whole proceeding, commencing with the negotiation and ending with the performance of the contract. It is also defined as a broader term than contract, including not only that, but any occurrence between the parties that may become the foundation of an action.⁵

This provision was purposely made general, so that courts, following the liberal rules of the chancery courts, may adopt such interpretations as may be found most convenient and best calculated to promote the ends of justice.⁶

Sec. 24. Same transaction continued—Causes held joinable.—A review of the causes of action which the courts have held joinable under this division will be made in this section. An action upon an account may be joined with a cause of action to enforce a mechanic's lien on real estate given to secure the same, if the two causes of action affect all the parties;⁷ or an action on a tort and a contract, when arising out of the same

¹ O. Code, sec. 5019.

² Maxwell on Code Pldg., p. 343.

³ *Scarborough v. Smith*, 18 Kan. 399-406.

⁴ *Robinson v. Flint*, 16 How. Pr. 240.

⁵ Bliss on Code Pldg., sec. 125.

⁶ *New York & N. H. R. R. v. Schuyler*, 17 N. Y. 592, 604 (1858); *Fish v.*

Berkey, 10 Minn. 203-5; *Palmer v. Tyler*, 15 Minn. 106; *Pomeroy's Rem. R. & R.*, pp. 505-21; Bliss on Code Pldg., sec. 125.

⁷ *Clippenger v. Ross*, 3 W. L. M. 645 (Union Co. C. P., 1861). See sec. 586, as to mode of trial.

transaction and between the same parties;¹ an action upon an indebtedness and promise by an administrator as such, and one upon a promise of his intestate, if the demand be connected with the estate;² or several causes of action for penalties for repeated violations of a statute by a railroad company for excessive charges for fare;³ or an action for damages in ejecting a passenger, and for the statutory penalty for demanding excessive fare;⁴ or an action for purchase-money on a land contract, and one for the enforcement of a lien;⁵ or an action by a judgment creditor of an insolvent railroad company to enforce the payment of any balance due on stock subscriptions, the fund primarily liable, and in case that fund is insufficient he may ask the enforcement of the stockholder's individual liability, it being the peculiar province of a court of equity to marshal and apply such funds where all parties are in court;⁶ or an action to declare and enforce a trust and to determine the equitable rights of the party under a will;⁷ or an action for a breach of promise to marry and to pay a certain sum of money;⁸ an action for reformation and judgment thereon as reformed, such as an action to recover upon a policy of insurance and to reform the same is, according to the weight of authority but a single cause of action; it would seem, however, upon reason and principle, that there are two causes of action, and may be joined, but the mode of trial will be determined according to the paramount relief prayed for;⁹ or an action for a personal judgment

¹ R. S. sec. 5019. See *Sturgess v. Burton*, 8 O. S. 215-18. *Swan, J.*, *Cortes*, 17 Cal. 487.

said: "By the provisions of the code, the plaintiff may unite in one action all causes of action arising from 'the same transaction, or transactions connected with the same subject of action'; and this includes causes of action legal and equitable, *ex contractu* and *ex delicto*. But if the causes of action do not arise from the same subject of action, then causes of action *ex contractu* cannot, in general, be united with causes of action *ex delicto*." *P., C. & St. L. Ry. Co. v. Hedges*, 41 O. S. 233; *McIntosh v. McIntosh*, 16 How. Pr. 240; *Turner v. First National Bank*, 26 Ind. 562. See *Bliss on Code Pldg.*,

secs. 120, 125; *Jones v. Steamship*

² *Howard v. Powers*, 6 O. 92, 133.

³ *Railroad Co. v. Moore*, 33 O. S. 384; *Railroad Co. v. Cook*, 37 Q. S. 265.

⁴ *Railroad Co. v. Cook*, *supra*. See *Sullivan v. Railroad Co.*, 19 Blatch. 388.

⁵ *Linsley v. Logan*, 33 O. S. 376.

⁶ *Warner v. Callender*, 20 O. S. 190-96; *Bliss on Code Pldg.*, sec. 120.

⁷ *Spreen v. Sandman*, 2 O. C. C. 441-44.

⁸ *Dalton v. Barchand*, 2 Clev. Rep. 57.

⁹ *Globe Ins. Co. v. Boyle*, 21 O. S. 120.

founded on an original decree in foreclosure, and for a revivor of that decree and an order of sale for the amount due on the original decree, upon the ground that both causes of action are *ex contractu* in their nature and affect the parties defendant only;¹ or an action for fraud in the sale of a horse and for breach of warranty;² or two breaches of a contract for the delivery of goods, one that the goods delivered were not of the quality contracted for, the other that a portion of the goods contracted for were not delivered at all;³ or one petition may contain a claim for goods shipped to a commission merchant who converted them to his own use, and another that the proceeds of the same goods were by the commission merchant converted to his own use.⁴

An action for the recovery of damages for an assault and battery may be joined with one for false imprisonment;⁵ or an action against a carrier on account of its negligence and for money overpaid on freight;⁶ or an action for harboring a man's wife, conversion of his property, and for inducing the wife to execute a deed of land;⁷ or a cause of action for false imprisonment and one for malicious prosecution, when arising out of the same transaction;⁸ or an action for divorce and alimony, and to set aside a deed fraudulently made;⁹ or the different grounds for divorce, such as adultery and cruelty, may be joined in divorce proceedings;¹⁰ or in an action to cancel fraudulent certificates of stock having a common origin, all the holders thereof may be enjoined.¹¹

Sec. 25. Same transaction continued—Actions held not joinable.—Ohio courts have held that an action upon a claim against a defendant in his individual, and one in his representative capacity cannot be joined; that having elected to charge such a person in his representative capacity and

¹ Moore v. Ogden, 35 O. S. 430-34 (1880).

² Byers v. Rivers, 5 W. L. G. 37.

³ Work v. Mitchell, 1 Disn. 506 (1857).

⁴ Keeler v. Snodgrass, 8 W. L. B. 219.

⁵ Wiley v. Keokuk, 6 Kan. 94; Cahill v. Terrio, 55 N. H. 571.

⁶ Adams v. Bissell, 28 Barb. 382; Pomeroy's R. & R., secs. 468, 469.

⁷ Hamlin v. Tucker, 72 N. C. 502.

⁸ Barr v. Shaw, 10 Hun, 580; Henderson v. Jackson, 40 How. Pr. 168.

⁹ Damon v. Damon, 28 Wis. 510.

¹⁰ Beach v. Beach, 11 Paige Ch. 161; Bates' Pldg., p. 422; 2 Bishop's M. & Div., sec. 585.

¹¹ N. Y., etc., R. Co. v. Schuyler, 17 N. Y. 592.

failed, the action cannot be wholly changed and recovery had against him as an individual;¹ nor an action sounding in tort and upon a contract;² nor an action for divorce and specific performance as to the disposition of property;³ nor an action for the recovery of rent under a lease, and for the recovery of the premises as upon forfeiture of the lease.⁴ In an action on a bill of exchange, a claim for statutory damages and costs of protest need not be set forth in the petition as a separate and distinct cause of action disconnected from the claim on the bill.⁵

A tenant cannot join a cause of action against a landlord for breach of a covenant with one arising from trespass;⁶ or an action for the recovery of purchase-money and delivery of a certain note, and the discharge of the mortgage given to secure the same;⁷ or an action to secure possession and a conveyance to plaintiff of an apparent title by quitclaim or otherwise, and that a defendant be forever barred from asserting title to the same.⁸

It is not an essential requirement, but entirely optional, whether or not a party will avail himself of the privilege of joining legal and equitable causes of action, even though arising out of the same transaction.⁹

Sec. 26. Contracts express or implied.—The second class of actions which the code¹⁰ permits to be united are those arising out of contracts either express or implied. This provision is remedial and beneficial, and must receive a liberal construction.¹¹ Unlike the common law it includes all such contracts as were at common law called simple, special or implied contracts. Under this provision the fiction of an implied contract is preserved, as the right to waive a tort and sue upon an implied contract is still recognized;¹² as, where one has tortiously received money from another which he

¹ *Fleishmann v. Shoemaker*, 2 O. C. R., 152, suit on contract to convey land.

² *Nimocks v. Inks*, 17 O. 596.

³ *Roberts v. Glenn*, 1 Clev. Rep. 46.

⁴ *Countee v. Armstrong*, 10 W. L. B. 339.

⁵ *Bank v. Smith*, 1 Handy, 575.

⁶ *Weeks v. Keteltas*, 13 Daly, 559.

⁷ *Montgomery v. McEwen*, 7 Minn. 351.

⁸ *Lattin v. McCarty*, 41 N. Y. 107.

⁹ *Bruce v. Kelly*, 5 Hun, 229.

¹⁰ O. Code, sec. 5019.

¹¹ *Gridley v. Gridley*, 24 N. Y. 136; *Emery v. Pease*, 20 N. Y. 64.

¹² *Bliss on Code Pldg.*, sec. 153.

cannot in good conscience retain, there is an implied contract that the money will be returned, and an action can therefore be maintained in *assumpsit* for the money, or the tort may be waived and suit brought for damages instead.¹

And so where the tort is waived, and an action is brought in *assumpsit* as upon an implied contract, other causes of action upon express or implied contract may be united;² as, in an action for goods sold and delivered, another cause of action that the goods had been wrongfully taken may be joined.³

This class includes contracts in writing or by parol, promissory notes, bills of exchange, accounts, covenants and judgments.⁴ A cause of action upon a contract may be joined with another for damages arising from fraud or negligence connected therewith;⁵ or an action upon a written contract to build a house with one upon parol to do extra work and furnish extra material.⁶ While actions upon promissory notes may be joined with actions upon account, yet if one or the other is not due they cannot be united;⁷ nor can actions upon contracts which are inconsistent with each other be joined.⁸ So, where facts are stated in a petition making an action on a contract, as in *assumpsit* for the non-delivery of certain property, fraudulent statements or representations which operated as an inducement to enter into the contract and which are foreign to the complaint, and would only be available in a collateral proceeding entitling the plaintiff to another and different remedy than the one which he was seeking, should not be mingled with the facts which constitute the cause of action.⁹

Separate causes of action arising out of a breach of contract, and injuries to property the subject of the contract, intrusted to another to enable him to perform it, may be joined as arising out of one transaction.¹⁰

¹ Brundred v. Rice, 49 O. S. 640-50;
⁴ Waite's A. & D. 469 and cases cited:
 Ripley v. Gelston, 9 Johns. 201; 6
 Am. Dec. 271; 7 Lawson's R. & R.,
 sec. 3691.

³ Stewart v. Balderston, 10 Kan.
 181.

² Hawk v. Thorn, 54 Barb. 164.
 See Pomeroy R. & R., sec. 492; Grid-
 ley v. Gridley, 24 N. Y. 130.

⁴ Maxwell, Code Pldg., p. 350.

⁵ Jones v. Johnson, 10 Bush, 649.

⁶ Pierce v. Bicknell, 11 Kan. 262.

⁷ Wurlitzer v. Suppe, 38 Kan. 31.

⁸ Nichols v. Drew, 94 N. Y. 22.

⁹ Graves v. Waite, 59 N. Y. 158-9.

¹⁰ Badger v. Benedict, 1 Hilt. 414; 4

Abb. Pr. 176.

Sec. 27. Injuries to person and property.—Actions for injuries to the person and property may be joined in one action.¹ This includes actions for false imprisonment, assault and battery, injuries to personal property, negligence in the performance of duty, fraud and deceit, false representations, seduction,—in fact all torts excepting libel, slander and malicious prosecution, and all those for injuries to property, excepting causes of action for the recovery of real or personal property.² An action for an injury to property caused by an overflow arising from an obstruction in the street before the plaintiff became the owner of the premises, and also an action for damages for injury to the premises from the same cause after he became the owner, are joinable.³ But where a petition unites a cause of action for damages for false imprisonment with one for malicious prosecution, the plaintiff should be required to make an election upon which he will proceed to trial.⁴ As a wrong arising from fraud belongs to the class of injuries denominated injuries to property, a cause of action for deceit in the sale of property may be united with an action for the conversion of property, for both constitute injuries to property.⁵

Where two sales of property have been made by a public officer, one by the officer himself and the other by his deputy, in an unlawful or fraudulent manner, the two sales come within the division of transactions connected with the same subject of action, and also within the meaning of the third subdivision of the code as injuries to property, and as such may be joined in the same petition.⁶

Injuries to two pieces of property would not seem to constitute two causes of action unless the plaintiff should choose to divide the petition into two counts and call them such, the injury in respect to both being alike and continuous, even

¹ O. Code, sec. 5019.

² Bliss on Code Pldg., sec. 129; Pomeroy's R. & R., secs. 495-498; Maxwell on Code Pldg., pp. 351-2. As to injuries to person, see Wiley v. Keokuk, 6 Kan. 94; Cahill v. Terrio, 55 N. H. 571; Holmes v. Sheridan, 1 Dill 351; Freeman v. Webb, 21 Neb. 160, person and property. As to in-

juries to property, see Howe v. Peckham, 10 Barb. 656; 6 How. Pr. 229; De Silver v. Holden, 18 J. & S. 236.

³ Hall v. Railroad, 1 Disn. 59.

⁴ Nebenzahl v. Townsend, 10 Daly, 282.

⁵ Cleveland v. Barrows, 59 Barb. 364.

⁶ Freeman v. Webb, 21 Neb. 160.

though they should be considered two causes of action, and, so stated, they are properly joined.¹

Actions for distinct and independent injuries to property, whether the property injured in each case be the same or different property, and either real or personal, may be joined in the same petition;² or an action for damages for an injury to the person and to his property while a passenger upon a steamboat on the same voyage; or an action for damages to a horse caused by excessive driving with one for the conversion of the horse may be joined.³

Sec. 28. Injuries to character.—Different causes of action for injuries to character may be united in one petition,⁴ such as an action for slander and one for malicious prosecution,⁵ or for slander, libel and malicious prosecution,⁶ or an action for slander and false imprisonment when arising out of the same transaction,⁷ or for assault and battery and false imprisonment.⁸

But a petition claiming damages for slander and for assault and battery in the same count is bad on demurrer;⁹ and so with a petition charging slander against two defendants, alleging that they both spoke the slanderous words.¹⁰

Where a petition contains a general charge of uttering slanderous words at sundry times, each utterance furnishes a ground for recovery, and constitutes a separate cause of action and should be separately stated and numbered.¹¹ But if the defendant fails to move to require such a general charge to be separately stated, evidence of utterances between the dates in the petition may be admitted.¹²

Under codes abolishing the distinction between actions of

¹ *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229.

² *More v. Massini*, 82 Cal. 590.

³ *Somerville v. Metcalf*, 15 N. Y. Week. Dig. 154; *Jones v. Steamboat*, 79 Am. Dec. 142. See generally, Bliss on Code Pldg., sec. 129; Maxwell on Code Pldg. 351.

⁴ O. Code, sec. 5019.

⁵ *Shore v. Smith*, 15 O. S. 173.

⁶ *Brown v. Rice*, 51 Cal. 439; *Hull v. Vreeland*, 42 Barb. 543; *Martin v. Mattison*, 8 Abb. Pr. 3.

⁷ *Harris v. Avery*, 5 Kan. 146; *Carter v. De Camp*, 40 Hun. 253.

⁸ *Cahill v. Terrio*, 55 N. H. 571; *Wiley v. Keokuk*, 6 Kan. 94.

⁹ *Anderson v. Hill*, 53 Barb. 238.

¹⁰ *Anderson v. Pack*, 4 W. L. B. 596.

¹¹ *Alpin v. Morton*, 21 O. S. 536; *Swinney v. Nave*, 22 Ind. 178; *Fleischmann v. Bennet*, 87 N. Y. 231. See *Secor v. Sturgia*, 16 N. Y. 553; *Cracraft v. Cochran*, 16 Ia. 301.

¹² *Alpin v. Morton*, *supra*. See, also, *etc.* 754, *post*.

trespass and case, it has been held that counts charging malicious prosecution, false imprisonment and slander may be united.¹ The theory upon which such rulings are made is that reputation may be as effectually injured by malicious prosecution and false imprisonment, as by spoken and written words, although the latter is not generally considered as belonging to this division.²

A petition alleging a series of acts consisting of a publication of a libel and maliciously causing an arrest does not misjoin causes of action.³

In an action for slander a defendant may deny having uttered the words, and also set up as an additional defense by way of justification that the words were true.⁴

Sec. 29. Recovery of possession of personal property with damages.—Claims for the recovery of the possession of personal property, with or without damages for the withholding thereof, is the fifth class.⁵ The action falling under this head is replevin. An action on an account stated and *indebitatus assumpsit* cannot be joined with replevin.⁶ The most common claim which is united with an action of replevin is one for damages.⁷

Sec. 30. Recovery of real property with damages.—Causes of action for the recovery of real property, with or without damages for the withholding thereof, or to recover the rents and profits of the same, or for the partition thereof, may be united in one petition;⁸ but being separate causes of action they should be separately stated and numbered.⁹

The foregoing statement made in former editions, or rather impressions from the plates, to the effect that there is more than

¹ *Krug v. Ward*, 77 Ill. 698; *Barr v. Shaw*, 10 Hun. 580.

² *Shore v. Smith*, 15 O. S. 178; *Hull v. Vreeland*, 42 Barb. 513; *Noonan v. Orton*, 33 Wis. 106.

³ *Watts v. Hilton*, 8 Hun. 606.

⁴ *Buhler v. Wentworth*, 17 Barb. 649. See sec. 754, *post*.

⁵ O. Code, sec. 5019.

⁶ *Corbin v. Ponce*, 1 C. S. C. R. 259-61.

⁷ *Pharis v. Carver*, 13 E. Mon. 236. See chapter on Replevin.

⁸ O. Code, sec. 5019; *Perry v. Richardson*, 27 O. S. 110, partition and account for rents. See *Black v. Drake*, 28 Kan. 482; *Harrall v. Gray*, 12 Neb. 543; *Vandervoort v. Gould*, 36 N. Y. 639; *Scarborough v. Smith*, 18 Kan. 399; *Van Alstine v. McCarty*, 51 Barb. 326; *Sternberger v. McGovern*, 56 N. Y. 12.

⁹ *McKinney v. McKinney*, 8 O. S. 423-29.

one cause of action in the code action to recover possession of real estate with or without damages, has been questioned and discredited. Other textbooks make the claim that there is only one cause of action.¹ It seems to the author that the spirit of the code in making the change from the common law, and the authorities should be followed, rather than personal views of an author.

No discussion has been found in any of the books as to what the common law was with reference to the matter as reflecting upon the meaning of the Code provision. This is essential to a proper solution of the matter. What was the Code designed to accomplish, a change or a continuation of the rule which prevailed under the old practice? Undoubtedly a continuation of the same principle or theory, but a change in form. If we can determine what the common-law rule was, then we have solved the problem as to whether or not the Code contemplated, just what the language seems to imply—that there is more than one cause of action in an action to recover real property, with or without damages for the withholding thereof, and to recover rents and profits.

We can only determine whether or not at common law, it was regarded that there was a cause of action for the recovery of the realty and one for the damages—as well as one for the rents and profits—by ascertaining what the course of procedure at common law was, for we have been unable to find any direct statement in any of the common-law works that there were two or three causes of action. That, because of their forms of procedure, would be expected. What we do find is this: The common-law action of ejectment passed through several stages of changes. Before the fictions in ejectment were invented, the plaintiff recovered the term with his costs and damages. But after the fictions became a part of the action, *substantial* damages could not be recovered, but only nominal, and hence, after a judgment in ejectment, the plaintiff then had to pursue a different *form of action*, viz.: trespass, to recover mesne profits, in which damages for the time he was kept out of the possession of the land were claimed.²

What is now accomplished by the code provision under con-

¹ Pomeroy's Code Rem., sec. 454; criticised as a dictum. It is, however, a correct statement. Bliss Pl., sec. 115; Phillip's Pl., sec. 210. The statement by Judge

² McKelvey's Com. Law Pldg., p. 100; Adams on Ejectment, 1st Am. Ed. 1846, chap. 14. Swan in McKinney v. McKinney, 8 O. S. 423-429, to the effect that there are two causes of action, is

sideration, at common law, was secured by two different forms of action, namely: ejectment for the recovery of the term, with possibly nominal damages, and trespass for mesne profits,—which shows that at common law, the subject-matter involved in an action for the recovery of real property with damages or rents and profits, constituted two separate actions or causes of action.¹

If it was necessary, therefore, at common law to pursue two different forms of action to recover the possession and the damages, or the rents and profits, was it not designed to authorize these two separate causes of action to be joined in one petition under the Code? The authorities, that is, the decisions in the various states where the question has been raised, clearly recognize the same distinction, and hold that there is a cause of action for the possession of the property, and a separate and distinct cause of action for the damages or the rents and profits.²

An action, however, to recover rents due upon a lease, asserting a forfeiture in consequence of such non-payment, and

¹"As, in most actions of ejectment, unless the right is expressly given merely nominal damages and costs by statute. His remedy, in the absence of such a statute, is to complete the remedy for damages, bring an action of trespass for mesne profits after he has recovered in ejectment. This action is when the possession has been long detained, an action of trespass for mesne profits must be brought, in form an action of trespass, *vi et armis*, but it is in effect to recover after the recovery in ejectment." Saunders on Pldg., 667 (205). the rents and profits of the estate during the time the defendant was in possession." Shipman's Com. Law Pldg. 125. See *ante* sec. 7-10, where this action is explained historically.

"The damages, as we have seen, are merely nominal, and it is usual to remit them in order to recover a real compensation in an action for trespass for the mesne profits."

²Chitty Pldg., 214, 215. Adams on Ejectment, 241.

"At common law, and under the early English statutes which are a part of the common law in some of our states, or which have been substantially reenacted, the plaintiff, in addition to the recovery of the land itself, is entitled to recover damages for his dispossession, but these damages are merely nominal. Though the plaintiff may have been kept out of possession for a long time, he cannot recover for mesne profits in the action of ejectment proper, ³Larned v. Hudson, 57 N. Y. 151; Pengra v. Munz, 29 Fed. 830 (Ore. Cir. Ct. 1887); Scarborough v. Smith, 18 Kan. 399; Black v. Drake, 28 Kan. 482; Fletcher v. Brown, 53 N. W. 577 (Neb. 1892); Lingsdale v. Woolen, 120 Ind. 16; Holmes v. Davis, 19 N. Y. 488; 21 Barb. 265; 2 Tomkins v. White, 8 How. Pr. 520; Livingstone v. Tanner, 12 Barb. 481; Vandervoort v. Gould, 36 N. Y. 639-645. Judge W. T. Mooney, one of the learned trial judges in Ohio, I have learned, decided a case in accordance with the text, reaching his conclusions in the same manner as herein outlined. See 2 Yapple's Pldg., 749.

asking to be restored to the possession of the property, cannot be maintained, as the remedies are inconsistent with each other;¹ or a petition stating a cause of action for the recovery of realty upon the forfeiture of a lease, with damages, for an injunction against waste and for a receiver, is a misjoinder.²

It has been held, too, that an action to have certain real and personal property partitioned, and also for an accounting between the joint owners, may be joined, and if justice requires the real and personal property to be sold together, that may be done;³ or a claim for the recovery of land, and for the value of the occupancy of it, may be united.⁴

As legal and equitable causes of action may be joined, an action for specific performance of a real contract, and one for damages, may be joined; and if it appears to be necessary to obtain the rights of a party, he may have both tried, but the modes of trial will be different;⁵ but a plaintiff in an action for the recovery of real property cannot claim absolute ownership, and damages for keeping him out of the use of it, to a greater extent than may be covered by the defendant's lease thereof.⁶

In an action for the recovery of real property the plaintiff may also attack a deed under which the defendant claims title upon both legal and equitable grounds.⁷

Sec. 31. Claims against trustees.—The last class is claims against a trustee by virtue of a contract or by operation of law.⁸

Where one of two persons who have signed a bill of exchange dies and the surviving debtor is appointed his executor, suit upon such bill cannot be sustained against the survivor personally and as trustee;⁹ nor can an action against a trustee of an insolvent bank for the recovery of damages occasioned by illegal and unauthorized investments made by

¹ *Owens v. Hickman*, 2 Dian. 471, holding that judgment may be rendered for the rent and the action for the recovery dismissed. See *Stuyvesant v. Davis*, 9 Paige Ch. 427, 430; *Underhill v. Railroad Co.*, 20 Barb. 467.

² *Countee v. Armstrong*, 10 W. L. R. 339.

³ *Prentice v. Janssen*, 7 Hun. 86.

⁴ *Armstrong v. Hinda*, 8 Minn. 254.

⁵ *Sternberger v. McGovern*, 56 N. Y. 12-20.

⁶ *Smith v. Hallock*, 8 How. Pr. 78.

⁷ *Phillips v. Gorham*, 17 N. Y. 270.

⁸ O. Code, sec. 5012.

⁹ *Landau v. Levy*, 1 Abh. Pr. 374.

him be joined with an action upon a bond given by him to assist in making up a deficiency in the assets of the bank.¹

Causes of action arising out of a breach of trust by a testator may be united with an action against his executor to compel him to account to the extent of the assets in his hands for the misconduct and breach of conduct of his testator,² or several breaches of the same trust.³

Where an agent who has been intrusted with money with which to buy real estate purchases the property and takes title in himself and sells and appropriates the proceeds thereof to his own use, an action may be maintained against him as for money wrongfully withheld, and also for money wrongfully or fraudulently exacted and paid.⁴

A claim to enforce an express or implied trust may be united with one to enforce a vendor's lien existing without any written contract.⁵

An action to compel an agent who has purchased certain stock for another at a judicial sale, and who was to hold it in trust for the payment of a debt, to account for the same may be joined with another alleging want of jurisdiction in the court making the sale, and that the agent under color of such proceedings procured the transfer of the stock and received dividends thereon.⁶

Sec. 32. Actions to enforce liens.—A doubt was once expressed as to whether an action on a note, and one on a mortgage securing the same, were joinable.⁷

After the passage of the act in 1864⁸ which provided that in suits to foreclose a mortgage given to secure the payment of money, or to enforce a specific lien for money, a judgment for money claimed to be due may be asked, as in a civil action for the recovery of money, and a construction given it⁹ to the effect that an action on a note, and another on a mortgage securing the same, could be joined in a single action, this practice has been followed.¹⁰

¹ French v. Salter, 17 Hun. 546.

⁷ McCarthy v. Garraghty, 10 O. St.

² Price v. Brown, 10 Abb. N. C. 67. 438.

³ Id.

⁸ O. Code, sec. 5021.

⁴ Kraemer v. Deusterman, 37 Minn.

⁹ King v. Safford, 19 O. S. 587.

469.

¹⁰ Butzman v. Whitbeck, 42 O. S.

⁵ Burt v. Wilson, 28 Cal. 632.

237.

⁶ Williams v. Lowe, 4 Neb. 382.

The right to sue in equity to enforce a mortgage lien, and to proceed at law to collect a debt, are regarded as different but concurrent remedies, but both available in the same action. In order, however, to secure a personal judgment, the petition must contain a prayer to that effect,¹ and a judgment for money in such cases creates a lien upon the land of the debtor other than that conveyed by the mortgage.²

Judgment, too, may be rendered in a single action against all the makers of a note, although the mortgage is executed by a part only of the makers of the note,³ and against a defendant who has been served with process in a county other than the one in which the action is pending,⁴ but not where service has been made by publication.⁵

The section of the code providing for personal judgment, and under which the joinder of actions on the note and mortgage is allowed, is held not applicable to an action against a mortgagor and his grantee for the foreclosure of a mortgage, the grantee not personally assuming the indebtedness, but applies only where the party against whom the lien is sought to be enforced is also personally liable for the debt secured.⁶

Following the principle of the common law, that three actions could be maintained upon a debt secured by a mortgage,⁷ it is not considered mandatory that the two remedies be demanded under the code, but that separate actions may be maintained, one to foreclose and the other for a personal judgment, in the same count at the same time.⁸

An action to recover a statutory assessment for tax and penalty may be joined with another to enforce the lien created by such statute.⁹

Sec. 33. Remedy for misjoinder.—The code¹⁰ provides that when several causes of action have been improperly united a demurrer may be filed.¹¹

¹ *Giddings v. Barney*, 81 O. S. 80; Ch. 830; *Delahey v. Clement*, 2 Scam. Spence v. Insurance Co., 40 O. S. 520. 575; *Joslin v. Millspaugh*, 27 Mich.

² *McCarthy v. Garraghty*, 10 O. S. 517; 2 *Daniell*, Ch. Pr. 815.

³ *Linsley v. Logan*, 83 O. S. 879.

⁴ *Spence v. Insurance Co.*, 40 O. S.

⁵ *King v. Safford*, 19 O. S. 587. 517-20.

⁶ *Maholm v. Marshall*, 29 O. S. 611.

⁷ *Butzman v. Whitbeck*, 42 O. S.

⁸ *Wood v. Stanberry*, 21 O. S. 142. 223.

⁹ *Fleming v. Kerkendall*, 81 O. S.

¹⁰ O. Code, sec. 5062.

¹¹ *Corry v. Gaynor*, 21 O. S. 277.

¹¹ See sec. 101, *post*; O. Code, sec.

¹¹ *Dunkley v. Van Buren*, 8 Johns. 5064.

Sec. 34. Venue and parties in actions joined.—It is an essential requirement of the code that the causes of action united must not require different places of trial, and, except as otherwise provided, must affect all the parties thereto.*

*Q. Code, sec. 5020.

CHAPTER 4.

VENUE.

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| <p>Sec. 34a. Division of actions at common law—Local and transitory.</p> <p>34b. Is the division into local and transitory maintained under the code?</p> <p>34c. What must appear in the pleading as to venue.</p> <p>35. Actions for recovery of real estate.</p> <p>36. Sale of realty under mortgage or incumbrance.</p> | <p>Sec. 37. Action for specific performance.</p> <p>38. Where the cause of action arose.</p> <p>39. Against domestic corporation.</p> <p>40. Against railroad and other companies.</p> <p>41. Against non-residents.</p> <p>42. Other actions.</p> <p>43. Against administrators, executors, etc.</p> <p>44. Change of venue.</p> |
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Sec. 34a. Division of actions at common law—Local and transitory.—According to common-law practice actions were divided into local and transitory, the place or venue being determined by the nature of the action. It was then necessary to allege the place where the fact set forth in the pleading occurred. This was for the purpose of showing the parish, town, or hamlet where the facts constituting the cause of action arose, as originally the jury were selected from the neighborhood because of their supposed knowledge of the facts in dispute.¹ The place was charged as being within the county where the cause was to be tried. The practice was subsequently changed so that the jury were summoned not from the neighborhood of the occurrence, but from the county generally, and not because they had any knowledge of the facts.

¹ Bryant's Code Pl. 25-6; Andrew's Stephen Pl., p. 324.

Originally in England all actions were tried in the county in which they arose,¹ and hence all actions were local. But finally, we are told, that when men began to fly from their creditors, the rule was changed in the interest of justice, and actions were divided into *local* and *transitory*, the first relating to land, which were tried where the land was situate; the other, a debt or duty adhering to the person wherever he fled, and generally all matters relating to the person or personal property.

It was essential in pleading the facts that some of them be laid in some parish, town or hamlet within the county in which the action was brought, in order to justify the bringing of the action in that county.² It was considered essential that if any local fact was laid in a pleading at a certain place, and issue was taken on that fact, the place formed part of the substance of the issue, and must be proved as laid, or there would be a fatal variance.

But as to transitory facts the rule was that they might be laid as having happened at one place and be proved upon trial to have occurred at another place.³

Another definition given by Stephen is: "An action is local if all the principal facts on which it is founded be local, and transitory if any principal fact be of the transitory kind." In a local action the plaintiff had to lay the *venue in the action* truly. In a transitory one he could lay it in any county and in any town within the county he pleased,⁴ and prosecute the action wherever he could find the party.

The result of that rule was that if the action was local and the facts arose out of the realm, the same could not be maintained in the English courts. But in the case of the transitory action, although the facts all arose abroad, the action could be laid in any county in England, at the option of the plaintiff.

In England no inconvenience resulted from the distinction between *local* and *transitory* actions, as the appearance of a defendant could as effectually be compelled in one county as in another. That would be impossible in this country.

Sec. 34b. Is the division into local and transitory maintained under the code?—An explanation of the common-law division of actions into local and transitory was made

¹ 7 Co. 11.

³ Andrew's Stephen Pl., 329, 330.

² King v. Burdett, 4 Barn. & Ald.
175; Andrew's Steph. Pl., 325.

⁴ Andrew's Stephen Pl., 330.

in the preceding section, as it is necessary that we should understand the common law as to this matter, in order to appreciate the code provisions, the distinction being preserved substantially in many of the codes, designating the classes of actions which must be tried where the land is or where the cause of action arose, and they are usually made to conform to the local actions at common law.¹

In *Ohio*, Hitchcock, J., said: "Whether this distinction between local and transitory actions shall be adhered to must depend upon our own peculiar system of jurisprudence."² "In all cases under our system it would seem where the action is personal, and for the recovery of a debt or damages merely, unless otherwise expressly provided by statute, the appropriate county in which to exercise jurisdiction is the county in which a defendant may be found, so that process can be served upon him. It is not material that he should be a resident of the particular county; it is sufficient if he be found within it, so that process can be legally served. By such service the court from which the process was issued obtains jurisdiction of the person of the defendant, and having jurisdiction of the subject-matter of the controversy can proceed with the case. . . . Considering all the legislation of the state upon this subject of jurisdiction, we entertain the opinion that it is the person of the defendant which gives a court jurisdiction in a particular case, so far as locality is concerned. And as a defendant can not be compelled to answer in any county except the one in which he is served with process, except in some few specified cases, he must be held to answer there, provided the action be personal, and sounds merely in debt or damages, and that such actions must, in this state, be considered as transitory." The syllabus of the case states that: "The division of personal actions into *local* and *transitory* is not known in Ohio."

And Bradbury, J., in *Railroad Company v. Morey*,³ says: "This doctrine is as applicable to our present method as it was to that in use in 1840, when it was announced by this court." Of the correctness of this statement there is some doubt.

Let us see exactly what were included in local and transitory actions according to the common law.

¹ Bliss' Code Pleading, sec. 284.

³ 47 O. S. 210.

² *Genin v. Grier*, 10 Ohio 210, 212.

Mr. Stephen said that local actions comprised all matters relating to realty, and hardly any others; that transitory actions consisted of such facts as might be supposed to have happened anywhere, and therefore comprised debts, contracts and generally all matters relating to the person or personal property. He does not make it perfectly clear that there was such a division of local and transitory personal actions at common law. But Mr. Chitty is more clear and explicit. He says: "When the cause of action could only have arisen in a particular place or county, it is local, and the venue must be laid therein. As in real actions, mixed actions, waste, *quare impedit*, or ejectment for the recovery of the seizin or possession of land, or other real property, so actions, though merely for damages, occasioned by injuries to real property, are local, as trespass, or case for nuisance, or waste to houses, lands, water courses, right of common, ways or other real property, unless there was some contract between the parties on which to ground the action." Thus we see that there were a number of local personal actions under the common law. But at common law, just as under the code, whenever the cause of action was founded on privity of contract, although concerning or relating to real estate, it was transitory and not local.

Is not this distinction between local and transitory actions, both as to real and personal actions, preserved to a certain extent in the Ohio code?

Personal actions, it will be remembered, are those brought for the recovery of goods and chattels, or for damages, for breach of contract, or other injuries of whatever description. Actions for the recovery, partition and sale of real property are local under the code.¹ An action for specific performance is transitory and must be brought where the defendant resides.² Actions for the recovery of a fine, forfeiture, or penalty imposed by statute, against a public officer for an act done by him under color of his office, or for a neglect of his official duty, or on the official bonds of a public officer, are all *personal* actions, and must be brought where the cause arose or the facts occurred, and are therefore made local, as they must be brought in the county where the cause arose.³ These are probably the only local personal actions under the code.

¹ Sec. 5022.

² R. S., sec. 5024.

³ R. S., sec. 5025. See Bliss Pl., sec. 286.

Sec. 34c. What must appear in the pleading as to venue.—It is not necessary under the code as at common law, to lay the venue, that is, it is not one of the facts to be specifically alleged. But the fact must appear in some way in the petition that the subject-matter is properly within the jurisdiction or venue of the court, but not necessarily by a distinct and separate allegation. If it concerns land, or it is an action which must be brought where the cause arose or in some particular venue, it must be shown by the allegations in the petition that the subject-matter of the action is, or arose, in the county where the action is instituted. This will appear from the facts stated without a special allegation.

Sec. 35. Actions for recovery of real estate.—It must be borne in mind that the code provides reasonable and convenient rules with respect to the places where actions may be prosecuted, which must be liberally construed with a view to advancing the remedies afforded.¹ Actions for the recovery of real property, or of an estate or interest therein, must be brought where the subject of the action—the land—is situated.² If in more than one county the action may be brought in either; but this can be done only when the property is an entire tract.³ But the courts have no power or jurisdiction over an injury to land lying in another state.⁴

Under the California code an action for the determination of a right or interest in real property, "in any form," is one affecting the title, and is tried in the county where the land is.⁵ This will include an action to establish and enforce a vendor's lien,⁶ or an action to set aside a fraudulent conveyance of land by a debtor,⁷ although he lives in another county.⁸ It will

¹ Osborne v. Lidy, 51 O. S. 90.

² O. Code, sec. 5022.

³ O. Code, sec. 5023.

⁴ Du Breuil v. Penna. Co., 130 Ind. 137; Eachus v. Trustee, 17 Ill. 35; Dodge v. Colby, 108 N. Y. 445; Allen v. Com., etc., Co., 6 L. R. A. 416 and note.

⁵ Franklin v. Dutton, 79 Cal. 605.

⁶ Henderson v. Perkins, 21 S. W. Rep. 1035 (Ky., 1893).

⁷ Leaf v. Marriott, 29 W. L. B. 225 (Ham. Co. C. P., 1893) and cases cited; Mahoney v. Mahoney, 21 N. Y. S. 1097 (1893); Beach v. Hodgdon, 68 Cal. 187.

⁸ Marcum v. Powers, 9 S. W. Rep. 255 (Ky., 1888); Leaf v. Marriott, 29 W. L. B. 225 and cases cited.

also embrace an action for a trespass for an injury to real estate, which must be brought in the county where the land is.¹ And so with an action for the reformation of a contract of sale,² or an action to restrain a threatened injury.³ The rule is different with regard to trusts, which are more of a personal character. Thus, a court of equity which has acquired jurisdiction over the parties may enforce a trust in relation to lands situate in another state. This is a doctrine settled by numerous authorities.⁴ Nor does an action for the removal of trustees holding lands in trust, and for the appointment of a receiver, fall within this provision.⁵ A suit to enforce a trust upon realty may be brought in any county where the trustee resides, although the land be situate in another county.⁶ But it has been held that an action to enforce a resulting trust in land of which a person died seized may be brought in the county in which the land lies, even though the decedent die and his estate is administered in another county.⁷

Sec. 36. Sale of realty under mortgage or incumbrance. An action for the sale of real property under a mortgage lien or other incumbrance or charge must be brought in the county where the land is situate.⁸ Under this head may be classed an action to foreclose a mortgage, or deed of trust,⁹ or a creditor's bill,¹⁰ but does not apply to an action for the settlement of an insolvent corporation or partnership, in which case a court which has acquired jurisdiction over it may decree a sale of land in another county.¹¹

Sec. 37. Action for specific performance.—An action for the specific performance of a contract of sale of real estate may be brought in the county where the defendants or any

¹ *Du Breuil v. Penna. Co.*, 180 Ind. 187 (1891).

² *Franklin v. Dutton*, 79 Cal. 605.

³ *Drinkhouse v. Water Works*, 80 Cal. 308.

⁴ *Burnley v. Stevenson*, 24 O. S. 474; *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Penn v. Hayward*, 14 O. S. 802 and cases cited.

⁵ *More v. Superior Court*, 64 Cal. 845; 28 Pac. Rep. 117.

⁶ *Le Breton v. Superior Court*, 64 Cal. 27.

⁷ *Reese v. Murnan*, 81 Pac. Rep. 1027; 5 Wash. 373. Washington Code, 158, is substantially the same as the Ohio Code.

⁸ O. Code, sec. 5022.

⁹ *Mathias v. Bridge*, *McCahon*, 118.

¹⁰ *Butler v. Birkey*, 18 O. S. 514.

¹¹ *Mechanics' Trust Co. v. Cobb*, 20 S. W. Rep. 891 (Ky., 1892); *Webb v. Wright*, 2 Bush, 126.

of them reside.¹ It may, in fact, be brought either in the county where the land lies, or in the place where one of the defendants resides.² And where all of the parties are within the jurisdiction of the court, a decree for the specific performance of an agreement to convey land lying in another state may be made.³ But this cannot be done where part of the defendants are non-residents.⁴

Sec. 38. Where the cause of action arose.—An action for the recovery of a fine, forfeiture or statutory penalty, excepting that imposed for an offense committed on a river, water-course or a road which is the boundary of a state or of two or more counties, or against a public officer for an act done by him by virtue of or under color of his office, or for neglect of his official duty, or on the bond of an official, shall be brought in the county where the cause of action arose. Under the exceptions given an action may be brought in any county bordering on such river, water-course, or road, or opposite to the place where the offense was committed.⁵ There is also another exception allowing the attorney-general of the state to bring an action on behalf of the state in the county where the capital is located, even though none of the defendants reside there.⁶ It is needless to undertake an extended review of adjudications which fall under this head, as questions of venue of actions falling within this class must be determined by the facts of the particular case.

Sec. 39. Against domestic corporations.—Actions against a corporation may be brought in the county in which the corporation is situate or has its principal place of business, or in which the corporation has an office or agent, or in any county in which a summons may be served upon the president, chairman or president of the board of directors or trustees or other chief officer, except actions for the recovery, partition or sale of property, or to compel the specific performance of a contract of sale of real estate, or for the recovery of a fine, forfeiture or penalty. But an action may be brought against an insurance company in the county in which the cause of action, or some part thereof, arose. Or if it be a mining corporation the action may be brought in any county where such corporation owns or oper-

¹ O. Code, sec. 5024.

² Owens v. Hall, 18 O. S. 571.

³ Penn. v. Hayward, 14 O. S. 302;

Burnley v. Stevenson, 24 O. S. 474.

⁴ Id. See, also, Boswell v. Sharp, 15 O. 447.

⁵ O. Code, sec. 5025.

⁶ State v. Newton, 26 O. S. 200.

ates a mine, and the cause of action, or some part thereof, arose.¹ An action may be brought upon a life insurance policy issued by a company organized within the state in the county where the death of the person insured occurred,² or in the county where the cause of action arose, even though it has no agent there.³ Where a mining company does business in one county and has an office in another, it may be sued in the latter county.⁴

Sec. 40. Against railroad and other companies.—An action against the owner or lessee of a line of mail stages, or other coaches, for an injury to person or property upon the road or line, or upon a liability as carrier, and an action against a railroad company, may be brought in any county through or into which such road or line passes.⁵ A railroad company may be sued in any county through or into which its road passes without regard to the nature of the cause of action.⁶ An action for services may be brought against it in any county where it has an office or place of business, or where any person resides upon whom process may be served.⁷ The provision that a railroad company may be sued in any county where an injury occurs is permissive and cumulative, and therefore not exclusive.⁸

¹ O. Code, sec. 5026 amended; 93 O. L. 125. The word *may* in this statute should read *must*. Kinsey v. B. S. & I. Works, 4 O. N. P. 293.

² Insurance Co. v. Pyers, 36 O. S. 544.

³ Insurance Co. v. McLimans, 28 Neb. 653 (1890).

⁴ Dade Coal Co. v. Haskett, 88 Ga. 549 (1890).

⁵ O. Code, sec. 5027.

⁶ Railway Co. v. Jewett, 37 O. S. 649. As to service on railroad company, see Railway Co. v. McLean, 1 O. C. C. 112. A service of summons on a regular ticket and freight agent at and in charge of an established station, the road being in the hands of a receiver, and such agent having been designated and appointed by the receiver, is not good service. Railroad Co. v. Ormè, 1 O. C. C. 511.

Service of summons upon a foreign railway company cannot be made by serving the writ upon a mere traveling solicitor of business for such company. Wilson v. Railroad Co., 16 W. L. B. 6. Service may be made upon a foreign corporation by serving a managing agent within the state (R. S., sec. 5046; American Express Co. v. Johnson, 17 O. S. 641), and upon the general freight agent of a foreign railroad corporation. Transportation Co. v. Railroad Co., 1 C. S. C. R. 311. See Gibbon v. Coal Co., 2 C. S. C. R. 75.

⁷ Railroad Co. v. Spellbring, 1 Ind. App. 167 (1890).

⁸ Williams v. Railway Co., 16 S. E. Rep. 303 (Ga., 1892).

Sec. 41. Action against non-residents.—An action other than those specially provided for¹ against a non-resident or a foreign corporation may be brought in any county in which there is property of or debts owing to the defendant, or where the defendant may be found.² If a foreign insurance company, it may be brought in a county where the cause or some part thereof arose.³ The words "foreign corporation" do not include a corporation created by the laws of the state and located therein.⁴ Nor is the provision necessarily confined to an insurance company, but may apply to any foreign corporation which may be found in the state and sued in any county.⁵ But if the defendant cannot be found and personally served, jurisdiction can only be acquired by publication.⁶ And where the action is connected with the business of an office of a foreign corporation located in a particular county it may be brought there;⁷ or where all the defendants are non-residents, suit may be brought in any county.⁸ If a foreign corporation makes a contract in a county where it has an office, but which is to be performed in another county, a cause of action for its breach arises in the latter county.⁹ Where both plaintiff and defendant are non-residents, suit may be brought in any county in which the defendant may be found.¹⁰ A suit against a foreign corporation need not be brought where an agent resides, but may be commenced in any county and the writ directed to the county where the agent resides.¹¹ An action for damages for negligence may be brought in any county where the defendants or any one of them reside or may be served.¹²

Sec. 42. Other actions.—After enumerating the various causes of action and their venue, the code provides that "every

¹ O. Code, secs. 5022-25; *ante*, secs. 35-40.

² O. Code, sec. 5080; *Williams v. Welton*, 28 O. S. 451.

³ O. Code, sec. 5080.

⁴ *Boley v. Insurance & Trust Co.*, 12 O. S. 139.

⁵ *Handy v. Insurance Co.*, 37 O. S. 371.

⁶ *Williams v. Welton*, 28 O. S. 451.

⁷ *Debb. v. Dalton*, 84 N. E. Rep. 286 (Ind., 1893).

⁸ *Estill v. Railroad Co.*, 41 Fed. Rep. 849.

⁹ *Equitable Mortg. Co. v. Weddington*, 21 S. W. Rep. 576 (Tex., 1893).

¹⁰ *Bryant v. McClure*, 44 Mo. App.

553.

¹¹ *Stone v. Insurance Co.*, 78 Mo. 655.

¹² *Drea v. Carrington*, 32 O. S. 595.

other action may be brought in the county in which a defendant resides or may be summoned, excepting those in the next succeeding section."¹ It frequently happens that two defendants reside in different counties, in which case an action may be brought in the county in which either resides, and service made upon the other in the county in which he resides. This occurs most frequently in commercial transactions. The rule is stringent, and justly so, that in order to give jurisdiction over the defendant residing in a county other than that in which the action is brought, he must have a real or substantial interest in the subject of the action adverse to the plaintiff.² If it be shown that the one residing in the county where the action is brought is not liable, then the other defendant should be dismissed.³ It has been held that an action to enforce a stockholder's liability cannot be brought in a county where none of the defendants reside, even though one of them acknowledges service.⁴

Sec. 43. By and against administrators, executors, etc.— An action may be brought against an administrator, executor, guardian, or trustee, in the county where he was appointed or resides or may be summoned.⁵ It is said that an action by an executor for the price of bank stock, or to specifically enforce a contract of sale, is transitory and not local,⁶ although in a very early case in Ohio it was held that no such division of personal actions as local and transitory actions was recognized;⁷ and the doctrine was also recognized in a later case,⁸ though it seems that what the court said in the opinion of the later case was *dictum*, as the case in question came under a

¹ O. Code, sec. 5081; sec. 43, *post*.

² *Allen v. Miller*, 11 O. S. 374. Where one of two defendants in a county where suit is brought acknowledges service, a writ may be issued for another defendant in another county. *Hendricks v. Fuller*, 7 Kan. 381.

³ *Dunn v. Hazlett*, 4 O. S. 435.

⁴ *Lamont v. Insurance Co.*, 10 W. L. B. 418 (C. S. C. R.). It may be maintained against the stockholders jointly under the Texas statute in the

county where some of them reside *Mathias v. Pridham*, 20 S. W. Rep 1015 (Tex., 1892).

⁵ O. Code, sec. 5081; *Osborn v. Lidy*, 51 O. S. 90; *Steel v. Burgert*, 1 Clev. Rep. 377.

⁶ *Trimble v. Lebus*, 22 S. W. Rep. 329 (Ky., 1893).

⁷ *Genin v. Grier*, 10 O. 210 (1840); *Railroad Co. v. Morey*, 47 O. S. 207.

⁸ *Railroad Co. v. Morey*, 47 O. S. 210.

section of the statutes (sec. 5027) which extended a privilege rather than being a positive requirement. At any rate the only question involved was whether under the statute the defendant could waive the privilege and submit to the jurisdiction of the court. In the opinion of the writer the code in effect still preserves the old distinction between local and transitory actions, whether personal or real; that is, those principles have been incorporated into the code. A suit by an administrator for the sale of lands should be brought in the county where the appointment was made, or in the county where the real estate of the deceased is situate;¹ but an action upon the bond of an administrator is properly brought in the county where the cause or some part thereof arose.²

Sec. 44. Change of venue.—A change of venue may be had to an adjoining county where it appears that a fair and impartial trial cannot be had in the county where the suit is pending. It may be made from one superior court to another superior court, or to the court of common pleas of an adjoining county.³ A change of venue may be had when the judge is interested in the cause,⁴ which must, however, be a pecuniary interest in the result of the trial.⁵ An objection that the removal is not to the nearest county must be taken before trial, otherwise it is waived.⁶ An application for a change of venue because of the undue influence of the plaintiff over the inhabitants of the district is addressed to the discretion of the court;⁷ in fact in any case the power to change the venue in a civil action rests to a great extent in the sound discretion of the court, depending upon circumstances, and should be upon clear and satisfactory proof.⁸

¹ R. S., sec. 6137. See *Walker v. 153. When a stockholder, Gregory Yowell*, 21 S. W. Rep. 873 (Ky., 1893).

² *Skelly v. Bank*, 9 O. S. 606.

³ R. S., sec. 5025. See *Stewart v. Morrison*, 81 Tex. 396.

⁴ *Bigelow v. Wilson*, 54 N. W. Rep. 465 (Ia., 1893).

⁵ O. Code, sec. 5032. A corporation may have a change of venue. See Code, sec. 5033.

⁶ *Bank v. Ward*, 11 O. 128; *Utsey v. Railroad Co.*, 17 S. E. Rep. 141; *Vaughn v. Hixon*, 50 Kan. 773; *Fletcher v. Stowell*, 17 Col. 94. The privilege may be waived. *Fletcher v. Stowell*, *supra*.

⁷ R. S., sec. 550; 84 O. L. 129; *Barnett v. Ashmore*, 31 Pac. Rep. 466 (Wash., 1892).

⁸ *State ex rel. v. Winget*, 37 O. S.

CHAPTER 5.

THE PETITION.

(1) ITS FORMAL PARTS. (2) RULES OF PLEADING

(1) *Its Formal Parts:*

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| Sec. 45. Pleadings defined. | Sec. 48k. Infants—Names how designated. |
| 46. What pleadings allowed. | 46l. Names of parties in their representative capacity. |
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(2) *Rules of Pleading:*

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PART 1. THE PETITION—ITS FORMAL PARTS.

Sec. 45. Pleadings defined.—Pleadings are the written statements by the parties of the facts constituting their respective claims and defenses; all fictions are abolished, and the title of a cause shall not be changed at any time, except when a de-

defendant prosecutes error.¹ A pleading is the statement of the facts in a logical and legal form, which constitute a cause of action.

Sec. 46. What pleadings allowed.—The only pleadings allowed under the code are the petition, demurrer and answer, which, when affirmative relief is demanded therein, may be styled cross-petition, and reply.² The only pleadings in actions under the code are those prescribed thereby. It constitutes a complete system, preserving all of the remedies of the old systems, both of law and equity, in some form; but the method of procedure and system of pleading by which the jurisdiction of the court is invoked are to be found in the code, and its interpretations. The system of pleading and procedure prescribed by the code, consisting of the pleadings above named, are sufficient to meet the necessities of all parties in all cases and in all courts.³

There are in addition to those already named the amended and supplemental pleadings which come about through the right of amendment conferred by the code.

The name which may be given to a pleading is not necessarily controlling, nor is its character determined by its title, but by the averments it contains. It will be regarded as the kind of a pleading which its allegations show it to be.⁴

For instance, an answer may be treated as a cross-petition, and the proper relief granted under it, if it contain a prayer for judgment and the necessary averments to show the party's right to such relief.⁵ Or, if an answer purports to set forth a counterclaim, but only alleges matter which constitutes a defense, it will be so treated.⁶

And though an answer sets up matter so unskillfully as not to distinguish between the three kinds of defenses which he may allege, if it contains facts sufficient to show a defense under either, the court will so treat it.⁷

Sec. 46a. Venue—Name of court and county.—The first requisite of a petition is that it shall contain the name of the

¹ O. Code, sec. 5058.

² O. Code, sec. 5059.

³ Kollock v. Kaiser, 73 N. W. Rep. 776 (Wis., 1897).

⁴ Cincinnati v. Cameron, 33 O. S. 336; Raymond v. Railroad Co., 57 O. S. 271.

⁵ Klonne v. Bradstreet, 7 O. S. 322,

Bartholomew v. Lutheran Congregation, 35 O. S. 574.

⁶ Westfall v. Dungan, 14 O. S. 276, 280.

⁷ Hill v. Butler, 6 O. S. 207, 216; Wiswell v. Church, 14 O. S. 31; Lancaster, etc., Co. v. Colgate, 12 O. S. 344.

court and the county in which the action is brought.¹ Under the old practice the omission of the name of the court was a fatal defect;² but a mistake in its designation or an omission of the style or name is now regarded as an immaterial clerical error,³ and may be corrected on motion,⁴ but can not be remedied by a demurrer.⁵ A substantial compliance, however, with this provision will answer.⁶ So, where the name of the court is given, but the name of the county is inadvertently omitted, it will be sufficient,⁷ and the petition may be amended so as to cure the defects in this respect at any time, even after answer.⁸ It is not essential that any particular place within a county be named.⁹

What should appear in the petition as to this matter has been explained when speaking specially of the subject of venue.¹⁰

46b. Names of parties.—The names of the parties to an action must be stated, followed by the word "petition."¹¹ This means that the names of all of the parties plaintiff and defendant shall be stated in the caption, and here will probably arise the most important feature of what may be termed the formal requisites of a petition. It is said, however, that a slight variance in the spelling of the names is immaterial;¹² nor will a petition which omits the name of the plaintiff and defendants in the caption, or the word petition, be subject to a demurrer;¹³ nor will it be stricken from the files for the same reason.¹⁴

The name of an individual who is not suing in an official or representative capacity, on the caption is sufficient; it need not

¹ O. Code, sec. 5060.

² Ward v. Springham, 1 Code R. 118.

³ McLaran v. Morgan, 27 Ark. 148; Clark v. Comford, 12 S. Rep. 763; 45 La. Ann. — (1893).

⁴ McLaran v. Morgan, *supra*.

⁵ Blackwell v. Montgomery, 1 Handy, 40. It being a matter of form, an omission of the name of the court can not be reached by demurrer where a good cause of action is stated. Smith v. Flack, 95 Ind. 121; Lowry v. Dutton, 28 Ind. 473; Goodall v. Mopley, 45 Ind. 355; Ewing v. Hatfield, 17 Ind. 513.

⁶ Ammerman v. Crosby, 26 Ind. 451; Pudd v. Kramer, 14 Kan. 101;

Van Benthysen v. Stevenson, 14 How. Pr. 70.

⁷ Blackwell v. Montgomery, 1 Handy, 40. See Hotchkiss v. Crocker, 15 How. Pr. 336.

⁸ Merrill v. Grinnell, 10 How. Pr. 31; Hotchkiss v. Crocker, *supra*.

⁹ Martin v. Martin, 51 Me. 306; Bean v. Ayers, 67 Me. 487.

¹⁰ See *ante* sec. 34c.

¹¹ O. Code, sec. 5060.

¹² Besley v. Pease, 24 S. W. Rep. 279 (Tex., 1893).

¹³ Blackwell v. Montgomery, 1 Handy, 40.

¹⁴ Hogan v. Capener, 1 Clev. Rep. 173; Blackwell v. Montgomery, *supra*; Butcher v. Bank, 2 Kan. 70.

be given again in the body of the petition, it being sufficient there to refer to the plaintiff or defendant.¹

Sec. 46c. Full Christian and surname should be given.

—There is no rule more certainly and satisfactorily settled or understood than that the full Christian and surname of the parties to an action must be set forth;² and where the full Christian name does not appear in the title or elsewhere it is held to be a fatal defect;³ and if not cured in any manner the petition will be subject to a demurrer.⁴ While it may be true that such a defect is considered by some authorities as fatal, unless corrected in some manner, a correction will always be made upon motion filed for that purpose,⁵ that is, an amendment will always be allowed, so that in any event, as a matter of fact, it can not be looked upon as a fatal defect in the strict sense of the term. It is, however, a loose and vicious practice to use the initials.⁶ It is only necessary to give the names in the caption of the pleading, and they need not, therefore, be repeated in the body.⁷

Sec. 46d. Where initials may be used.—It is also specially provided that parties to a written instrument by initial letter, or a contraction of the name, may be so designated in an action.⁸ The initial letter, however, is considered by some authorities as part of the name, thus holding that there is a variance when the name is charged without a middle initial, and the proof shows an initial letter.⁹

¹ See *Stubendorf v. Sonnenschein*, 11 Neb. 235; *Eiseley v. Taggart*, 72 N. W. Rep. 1040 (Neb., 1897).

² *Weisz v. Davey*, 28 Neb. 566, 569.

³ *Helf v. Shulze*, 10 O. 263. But see *Ferguson v. Smith*, 10 Kan. 402; *Zwickey v. Haney*, 63 Wis. 464, which hold it not to be fatal.

⁴ *Bascom v. Toner*, 31 N. E. Rep. 856 (Ind., 1892). The omission was held in a *dictum* in *Peden v. King*, 30 Ind. 181, to be only matter of abatement. And in *Bridges v. Layman*, 31 Ind. 386, that the omission of the Christian name was irregular but not void. In *Sherrod v. Shirley*, 57 Ind. 13, the court said on this subject: "This is a fatal objection if not cured by the process, amendment or by pleading, wherein the names are properly stated."

Jurisdiction is acquired over a party even though his Christian name is wrong and he is so served. *Lyons v. Donges*, 1 Disn. 142.

⁵ *Elliott v. Hart*, 7 How. Pr. 25; *Real v. Honey*, 58 N. W. Rep. 136; *Dole v. Manley*, 11 How. Pr. 138. A misnomer can not be noticed upon demurrer. *Slocum v. McBride*, 17 O. 607.

⁶ *Kellam v. Thomas*, 38 Wis. 601.

⁷ *Lowry v. Dutton*, 28 Ind. 473; *Express Co. v. Harris*, 120 Ind. 73; 21 N. E. Rep. 340; *Stubendorf v. Sonnenschein*, 11 Neb. 235.

⁸ O. Code, sec. 5010; *Ferguson v. Smith*, 10 Kan. 396.

⁹ *Mead v. State*, 26 O. S. 505; *Bliss on Code Pldg.*, sec. 146a. This certainly would not apply to civil actions.

Sec. 46e. Where name is unknown.—The rule is that a plaintiff who is ignorant of the name of a defendant may designate any name and description, and when the true one is discovered he may then amend the pleading accordingly. In such cases it must be stated in the verification of the petition that he could not discover the true name, and the summons must contain the words “real name unknown,”¹ and it should be averred that the plaintiff is ignorant of the true name.² The ignorance of a plaintiff, however, must be real and not willful, or such as might be removed by mere inquiry or resort to means of information easily accessible.³

Sec. 46f. The true name must be stated.—It is also essential that parties sue in their proper name, although an instrument upon which a suit is founded may have been executed by a wrong name;⁴ and also that the action be brought in the name by which a party is generally known, or that by which he has been known from boyhood, although he may have at some prior time had another name;⁵ and when known equally well by two different names he may be sued by either.⁶ The words “and others” have been held in error proceedings to be sufficient against all of the parties to the record.⁷

Sec. 46g. Partnership name.—At common law it was imperative that a declaration by or against a co-partnership should mention the names of the several partners.⁸

This rule worked no hardship when commercial transactions were limited, and individuals composing a firm were generally known; but when the number of partnerships were multiplied, and their business extended, it was not always practicable for persons who dealt with the firm to ascertain the names of the individuals composing it when they wished to enforce their claim. Hence the following statute was enacted.

¹O. Code, sec. 5118; *Morgan v. Thrift*, 2 Cal. 562. There must be a distinct allegation that the real name is unknown. *Gardner v. Kraft*, 52 How. Pr. 499; *Crandall v. Beach*, 7 How. Pr. 271. Where the name is not known but could be ascertained by inquiry, a party can not be sued by a fictitious name. *Rosencrantz v. Rogers*, 40 Cal. 489.

²*Rosencrantz v. Rogers*, 40 Cal. 489.

³*Rosencrantz v. Rogers*, *supra*.

⁴*Pinckard v. Millmine*, 76 Ill. 453. See, also, *Board v. Greenebaum*, 39 Ill. 609; *Becker v. Insurance Co.*, 68 Ill. 412.

⁵*Cooper v. Berr*, 45 Barb. 9; *Donaldson v. Same*, 31 W. L. B. 102; *England v. New York Pub. Co.* 8 Daly, 375.

⁶*Eagleston v. Son*, 6 Robt. 640.

⁷*Buckingham v. Bank*, 21 O. S. 131.

⁸1 Chit. Pl., 256.

"A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof."¹

This statute was enacted to enable suit to be brought against a partnership without naming any of them, and thereby obtain a judgment against them by their common name, and levy upon their joint property. The statute was intended to enlarge, not to restrict, the common law in regard to suits against co-partners.²

It is an elementary principle in pleading that where a statute confers a right or gives a remedy upon certain conditions, which did not exist at common law, the party who asserts the right or avails himself of the remedy must in his pleading bring himself or his case clearly within the statute.³ It is not necessary to state in the petition the individual names of the partnership, but the action is commenced against the partnership by its common name, omitting all reference to the partners as individuals.

The name of the partnership should not alone be stated in the caption of the pleading, but there must be an averment in the petition, which is matter of inducement (placing partnership in position to sue), that it is a partnership formed for the purpose of carrying on business in the state, as the statute requires.⁴

A foreign partnership can not sue by favor of the statute, but must sue in the individual names of its members.⁵ A domestic partnership may be sued both in the partnership name under the statute, or suit may be brought against the partners by their individual names, as before the statute, at the option of the plaintiff. This is so because the statute is not a substitute but an addition to the previously existing remedies.⁶

Sec. 46h. Fictitious names in partnerships—Suits by.—

A legislative enactment has been passed in Ohio and other states to the effect that every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners, must file with the county clerk a certificate containing the names of all the members of such partnership and their places of residence, and that

¹ O. Code, sec. 5011.

² *Dimond v. Minnesota Sav. Bank*, 73 N. W. Rep, 182 (Minn. 1897).

³ *Haskins v. Alcott*, 13 O. S. 210.

⁴ See sec. 967 *post*, Ch. 69 Partnership; *Haskins v. Alcott*, *supra*;

Beers & Co. v. Gurney, 7 Oh. Dec. 411; 14 O. C. C. 82.

⁵ *Brownson v. Metcalf*, 1 Handy, 188; *Critchell v. Cook*, 2 W. L. B. 97.

⁶ *Whitman v. Keith*, 18 O. S. 124, 144.

the same shall be published for three successive weeks in a newspaper published in the county. This does not apply to commercial or banking partnerships established and transacting business without the United States. There are certain minor requirements which may be found upon consulting the statute.¹ It is further provided that any persons doing business as partners contrary to the terms of the statute shall not "maintain an action on or on account of any contracts made, or transaction had in their partnership name in any court" of the state, until the certificate is filed and the publication is made.² The statute has been pronounced constitutional.³ It is a disabling act in the nature of a penalty, refusing to allow such a partnership the right to sue unless the certificate is filed in accordance with its provisions, and should not be strictly construed.⁴ Where the firm name sufficiently designates the persons composing it, as Hirsch Bros., it has been considered unnecessary for such a partnership to file a certificate.⁵ Partnerships clearly falling within the provisions of this act must comply with its terms before they can maintain an action. There has been some contention over the expression—maintain an action—some contending that it means to carry forward, and that it does not necessarily relate to the commencement of an action; that an action may be commenced notwithstanding the non-compliance with the conditions of the statute, but may not be prosecuted to final judgment. It undoubtedly refers to the commencement as well as to the carrying forward or completion. The questions which may arise are as to the effect of the failure of such partnership to comply with the statute upon the right to maintain an action; whether it is necessary to make a formal averment in the petition that the statute has been complied with; how the want of such averment, if necessary, is taken advantage of; whether the want of an averment and of compliance with the statute may be cured by an amendment. The lower courts are not in accord upon these questions.

¹91 O. L. 357.

²91 O. L. 357.

³Hartzell v. Warren, 11 O. C. C. 269; 5 Oh. Dec. 183.

⁴Cochran v. Hirsch, 6 Oh. Dec. 41; 4 O. N. P. 34; Pendleton v. Cline, 85 Cal. 142.

⁵Cochran v. Hirsch, 6 Oh. Dec. 41; 4 O. N. P. 34. On the contrary, it has been held that a partnership composed of two brothers, as M. D.

& Bro., could not maintain an action without first having filed a certificate. Doop & Bro. v. Lowell Mfg. Co., 3 O. N. P. 169; 2 O. N. P. 169. Such a partnership may make contracts and transact business under the fictitious name, and may assign choses in action enabling an assignee to sue. Kinsey & Co. vs. O. S. Ry., 2 Oh. N. P. 175.

It being a penalty imposed preventing the prosecution of an action by a partnership which has not complied with the statute, it follows that it is necessary that such a partnership must place itself in a position to sue by complying with the statute, and that it must show this fact to the court by proper averment in its pleading. The allegation for this purpose is by way of inducement—placing the partnership in a position to maintain its action upon its cause of action stated in its pleading—the latter following the matter of inducement.

If then the partnership has not made the formal averment that it has complied with the statute, it has not shown in the pleading its capacity to sue and maintain its cause of action, and it would be subject to a special demurrer for want of a capacity to sue. A general demurrer would not lie, as this averment, being matter of inducement, does not go to the merits of the cause of action. To be subject to a special demurrer on the ground stated it must be perfectly clear from the face of the pleading that the partnership has a fictitious name. These are the views and reasons of the author, and they find support in some of the decisions; all the cases are found in the note.¹ Where the names are disclosed in the petition it is not sufficient unless the certificate has been filed.²

Sec. 46i. Form of averment to be made by a fictitious partnership.—Plaintiff alleges that it is a partnership formed for the purpose of doing business in Ohio; and has filed with the clerk of the common pleas court of said county, where its principal place of business is situated, a certificate signed and acknowledged, stating the names in full, of all the members of said partnership, and their places of residence, and that the same

¹ *New Carlisle Bank v. Brown*, 11 O. C. C. 77; 5 Oh. Dec. 94; *Kinsey & Co. v. O. S. Ry.*, 2 O. N. P. 175; *George W. Groff et al. v. Mathews, Franklin Co., Evans, J.*, unreported, support the text. *Hartzell v. Warren*, 11 O. C. C. 269, holds that want of compliance is matter of defense to be taken advantage of by answer, and that an action should not be dismissed upon sustaining a demurrer, but that it could be amended. I think Judge Evans made the proper kind of an order, "unless

the plaintiff can amend their petition so as to show that they had complied with the statute before this action was commenced, judgment will be rendered for defendant on the demurrer." I believe that even though compliance with the statute will be had after the cause of action accrued, or even after the action be commenced, it ought to be brought in by amended or supplemental pleading.

² *Kinsey & Co. vs. O. S. Ry.*, 2 O. N. P. 175

has been published in a newspaper of said county once a week for three successive weeks.¹

Sec. 46j. Corporations—Names, how designated.—A corporation is known in law only by its corporate name. If it is not in fact a corporation duly organized under the law, it can not maintain an action by its corporate name. It is therefore self-evident that corporate capacity—the fact that it is a corporation duly incorporated under the laws of the state, is a fact which must be alleged in the pleading. Corporate capacity is challenged by a general denial, but not according to some authority,² and unless waived by the parties, proof must in such case be offered.

In actions, therefore, by and against a corporation the pleading must allege corporate capacity, the same being fatally defective if it does not contain such an allegation.³ If it is a foreign corporation, it should plead the name of the state and that it was organized under the laws of such state.⁴ If no averment of corporate capacity is made, and no objection is made, the defect is waived.⁵ But as already stated a general denial will raise the issue of corporate capacity, rendering it necessary for the plaintiff to make proof thereof.

It is necessary for a foreign corporation to obtain a certificate authorizing it to do business within the state.⁶ Such a corporation must, therefore, not only allege corporate capacity derived from the charter of the native state, but also compliance with license or registration law.⁷

Sec. 46k. Infants' names, how designated. An action by an infant can only be brought by his guardian or next friend.⁸ The name of the infant should be stated, followed by the name of his next friend, as A B, an infant, by C D, his next friend. This should appear in the caption and body of the petition.

Sec. 46l. Names of parties in their representative capacity.—All persons who may sue or be sued in their represent-

¹ The above is in the language of the statute, and is somewhat lengthy. To allege that: Plaintiff has complied with an act of the General Assembly of May 19, 1894, 91 O. L. 357, entitled an act to prohibit the use of fictitious names in partnerships would be shorter, but it does not state the facts.

² See sec. 1005, *post*.

³ See sec. 990, *post*.

⁴ Sec. 990, *post*; *Smith v. Sewing Machine Co.*, 26 O. S. 562.

⁵ *Spence v. Insurance Co.*, 40 O. S. 517.

⁶ 91 O. L. 355. See sec. 990, *post*, p. 954.

⁷ See *post*, p. 955, where the matter is more fully discussed in connection with the subject of corporations.

⁸ R. S., sec. 4998. See *ante*, sec. 12.

ative capacity, such as administrators and executors, guardians, trustees, assignee or receiver, must be so designated in the caption of the pleading, followed by a proper allegation in the body of the pleading. Every fact necessary to show that the appointment has been duly made should be set forth, and it should be shown with reasonable certainty that the remedy is sought in a representative capacity. The word *as* is usually inserted to show representative capacity, but its omission between the name of the plaintiff and the words descriptive of his representative capacity is not fatal.¹ A receiver has only such powers as are conferred upon him by the order of appointment, and his powers thereunder so far as are essential to maintain the particular suit should be set forth.² These matters are more fully treated in special chapters.³

Sec. 46m. Officers—Names in suits by.—As officers are permitted to sue and be sued in such name as is authorized by law,⁴ it is necessary that an averment be made showing the official capacity. The statutes authorize the various officials to maintain suits, and the averments must be made to correspond. For instance, corporation counsel is authorized to prosecute suits for and on behalf of the city,⁵ or to enjoin the misappropriation of corporate funds in the name of the city.⁶ The facts sufficient to place such officer in a position to maintain the suit must be stated.⁷

Sec. 46n. The inducement.—There was a division of matter to be pleaded prevailing at common law, which should be understood, as the distinction may still serve a useful purpose under the code. All matter pleaded was either (1) of the gist of the action, or (2) matter of inducement, or (3) matter of aggravation.

The gist of the cause of action or defense is the very essence of it—the subject-matter—the matter which gives rise to the cause of action or defense—the right which has been violated—without which the action could not be maintained. This term, therefore, is still applicable to our system and useful.

Matter of inducement is matter of an explanatory nature; a statement of facts explanatory of the statement of the facts constituting the cause of action or defense, when the latter do not

¹ *Beers v. Shannon*, 73 N. Y. 292.

⁴ R. S., sec. 4995. *Ante* sec. 10.

² See sec. 1069, 1870, *post*. Special chapter on Receivers.

⁵ R. S., sec. 1774.

⁶ R. S., sec. 1777.

³ See secs. 545–547. Sec. 1069, 1070, etc.

⁷ See Whittaker's Civ. Code, p. 28, note, for references to statutes.

show clearly the right of action or defense. The various fictions were usually stated in the common-law system by way of inducement, such as the fictitious loss or finding in trover, which now has no further application.

But matter of inducement, as we now understand and apply it, is a preliminary statement of facts necessary to show a right in the party to maintain the cause or defense, or that the plaintiff has the capacity to sue or defend, or that plaintiff stands in a proper relation to the subject-matter to enable him to sue. For example, facts showing representative capacity, official capacity, corporate capacity, privity of contract, or that plaintiff is a party to the contract, or a relationship between parties with reference to any injury complained of, such as master and servant, passenger and carrier, etc., are all matter of inducement, necessary to be stated to show the party to be entitled to maintain the cause of action subsequently stated; it is not a part of the cause of action or defense, but preliminary to it. To this extent matter of inducement is still a part of our present system.

It is the rule that the same particularity of statement is not to be observed in stating matter of inducement as in stating the cause of action or defense.

This matter may all be controverted by the other side, and when denied must be proved.¹

Matter of aggravation is that which has the effect of increasing the damages and can not be denied.

Sec. 46o. The facts constituting the cause of action.—Following the matter stated by way of inducement, come the facts constituting the cause of action, stated in the manner provided for by the code. It is quite essential that we have clearly in our minds the different formal parts of the pleading. The cause of action stands out as distinctly and separately as the caption, prayer, verification, etc. It commences where the preliminary matter stated by way of inducement leaves off, and ends where the prayer for relief commences. We must have a clear conception of the cause of action, as pleading can never be understood without it. The Rules of Pleading governing the form of statement of the cause of action or defense relate to and are used only in the statement of the facts constituting the cause of action or defense. These Rules of Pleading will all be treated at a separate place in the latter half of this chapter, and in the chapters on special subjects, and what constitutes the cause of action will there also be explained.² All other mat-

¹ Cf. Stephen Plg., 294.

² See sec. 47, *post*.

ters which go to make up the subject usually called Pleading may more properly be termed Procedure. These Rules of Pleading must not only be observed in the statement of the cause of action and defense, but in amended and supplemental pleadings, and in the Reply, but all these relate, add to or explain and form part of the cause of action or defense.

Sec. 46p. Demand for relief.—A petition must contain a demand for relief; if the recovery of money is demanded the amount shall be stated, and if interest is claimed the time for which interest is to be computed shall also be stated.¹ It is well understood that while a demand for relief is part of a petition, it is no part of the statement of facts required to constitute a cause of action. It is the legal consequences which the plaintiff conceives the law attaches to his statement of facts.² The entire omission of the same would not be a ground for demurrer, but could only be reached by motion,³ and may be amended to conform the relief to the facts proved.⁴ It will be looked to in determining the character of the action or the interest of the parties, together with the facts pleaded,⁵ and where the facts alleged render the character of the cause of action ambiguous and doubtful, the prayer will solve the doubt and determine the character of the action.⁶ The prayer may be for equitable relief, and the facts alleged and proved may constitute a legal cause of action.⁷ Where the allegations warrant legal relief only, the plaintiff cannot have equitable relief, and he must bring his case and proof within the allegations.⁸ It has been held that where the facts stated make a case for specific performance of a contract as well as one for damages, the plaintiff is entitled to have both tried if necessary to obtain his rights.⁹ The prayer may be for the cancellation of

¹ O. Code, sec. 5060.

⁶ O'Brien v. Fitzgerald, 143 N. Y.

² Draper v. Moore, 2 C. S. C. R. 167; 377.

Corry v. Gaynor, 21 O. S. 277; Phillips v. Dugan, 21 O. S. 466; Culver v. Rogers, 33 O. S. 546; Ashley v. Little Rock, 56 Ark. 391; 19 S. W. Rep. 1058; Hiatt v. Parker, 29 Kan. 765-771; Pomeroy's Code Rem., secs. 454-57.

³ Ashley v. Little Rock, 56 Ark. 391; 19 S. W. Rep. 1058.

⁴ Culver v. Rogers, 33 O. S. 546, and cases cited.

⁵ Reed v. Reed, 25 O. S. 422; Moore v. Chittenden, 39 O. S. 563-71.

⁷ Reed v. Reed, *supra*; Williams v. Slote, 70 N. Y. 601; White v. Lyons, 42 Cal. 279. The mere fact that equitable relief is improperly asked where a good cause of action is stated, does not make it an equitable action. Brown v. Bank, 5 Mo. App. 1.

⁸ Bradley v. Aldrich, 40 N. Y. 504; Arnold v. Angell, 62 N. Y. 508; Bank v. Mitchell, 73 N. Y. 415.

⁹ Sternberger v. McGovern, 56 N. Y. 12.

an instrument as well as for general relief, and the court may decree a reconveyance instead of cancellation,¹ as equity will adapt its relief to the exigencies of the case.² Under a prayer for damages for a breach of a contract as well as for a reformation, if necessary, the court may give such relief in damages as may be just, although the action for reformation is not sustained.³ A petition may ask for an injunction and for personal judgment⁴ or for injunction and an account,⁵ or a prayer for personal judgment for an assessment and for the enforcement of a lien.⁶ Under the old system recovery was confined to the case made by the petition or bill,⁷ but the code requires sufficient facts to constitute a cause of action;⁸ and any relief regardless of the prayer consistent with the case stated and embraced within the issue,⁹ or consistent with justice or justified by the facts,¹⁰ may be granted. And relief hostile to the theory of the allegations should not be granted.¹¹ But where there are two causes of action and the relief asked is inconsistent with only one, the plaintiff may be compelled to elect upon which he will rely.¹² Specific relief need not be asked, but if asked no greater amount can be granted without amendment.¹³ A petition which entitles the plaintiff to some relief will be good against a demurrer;¹⁴ and so with a prayer for more than the facts will warrant.¹⁵ If the defendant fails to answer and judgment is taken by default, the rule applicable to cases where trial is had cannot be invoked, but only such relief as is demanded can be had.¹⁶ A prayer for general relief which is inconsistent with that for judgment for a sum certain will not be stricken out.¹⁷ A prayer for relief may be in the alternative where the plain-

¹ Riddle v. Roll, 24 O. S. 572.

Burke, 143 Ill. 140; Bradley v. Ald-

² Murtha v. Curley, 90 N. Y. 372.

rich, 40 N. Y. 504.

³ N. Y. Ice Co. v. Insurance Co., 23 N. Y. 357. See Hale v. Bank, 49 N. Y. 626.

¹⁰ Davidson v. Burke, 143 Ill. 140.

¹¹ Graham v. Reed, 57 N. Y. 681.

⁴ Brundridge v. Goodlove, 30 O. S. 374.

¹² Brundridge v. Goodlove, 30 O. S. 374.

⁵ Converse v. Hawkins, 31 O. S. 209.

¹³ Armstrong v. St. Louis, 3 Mo. App. 100.

⁶ Corry v. Gaynor, 21 O. S. 277.

¹⁴ Baker v. Allen, 92 Ind. 101;

⁷ Ashley v. Little Rock, 56 Ark. 391; 19 S. W. Rep. 1058 (1892).

Crosby v. Bank, 107 Mo. 436; 17 S. W. Rep. 1004 (1891).

⁸ Id.

¹⁵ Missouri, etc., Land Co. v. Bushnell, 11 Neb. 192 (1881).

⁹ Ross v. Purse, 17 Colo. 24; 28 Pac. Rep. 473 (1891); Stevens v. Mayer, 84 N. Y. 296; Southwick v. Bank, 84 N. Y. 420; Davidson v.

¹⁶ Lane v. Gluckauf, 28 Cal. 288-94; Peck v. Railway Co., 85 N. Y. 246.

¹⁷ Durant v. Gardner, 19 How. Pr. 94.

tiff is unable to state exactly the relief to which he may be entitled.¹

Sec. 46q. Pleadings must be subscribed.—Every pleading must be subscribed by the party or his attorney,² and the amount for which judgment is demanded should be indorsed on the summons.³ A judgment will not be reversed where the petition was not signed by the plaintiff or his attorney, although the plaintiff had signed the affidavit, when no motion had been made to strike the petition from the files;⁴ nor when the name of plaintiff's attorney is printed instead of written.⁵

When a pleading has not been properly subscribed by counsel for the party, the adversary may file a motion to strike it from the files on account of the irregularity.⁶ The court will, if the motion is pressed and heard, sustain it and allow the pleading to be subscribed. There is nothing to be gained by this step, and counsel would better call the attention of the other side to the omission, and allow it to be corrected and thus save time.

Sec. 46r. Verification — Historically.— Verification of pleadings was not required at common law, and it could not be, because many of the pleadings were mere fictions, and were in fact untrue.

The object of verification was to secure truthful statements, and to abridge or shorten the pleadings and proceedings of courts. "To require a party to make affidavit to the truth of his statement would not only abridge the pleadings, but it would often dispense with proof, litigation and costs. * * * No man ought to be allowed to file in a court of justice as true a pleading which he either knows to be false, or which he does not believe to be true. No man should be sued for an unjust claim—no just claim should be resisted by a false defense. The time of court, witnesses and parties, should not be occupied in such litigation. * * * As to temptations to perjury, by requiring interested parties to make affidavit, we admit that it has some tendency in that direction, but not by any means so great as might at first view be supposed. * * * The affidavit is no evidence for the party himself, and it makes no more proof on the other side necessary. The temptation to perjury is very

¹ See *ante* secs. 21, 22; *Lyke v. Post*, 65 How. Pr. 298; *Cf. Durant v. Gardner*, 10 Abb. Pr. 445.

² O. Code, sec. 5102; *Finckh v. Evers*, 25 O. S. 82; *Conn v. Rhodes*, 26 O. S. 644.

³ *Id.*

⁴ *Conn v. Rhodes*, 26 O. S. 644.

⁵ *Hancock v. Bowman*, 49 Cal. 413.

⁶ *Conn v. Rhodes*, *supra*.

slight in most instances. * * * * A party filing in court a petition, or other pleading, ought not to be permitted to say that he would not *testify* to his belief of its truth on account of the inducement it would hold out to himself to swear falsely, or on account of the demoralizing tendency of such oaths."¹

"It is well known that the rules of pleading in equity recognized those states of the mind as to the truth of any proposition, which reason and experience show have always prevailed. They are expressed by words in common use, assent, dissent, doubt; or, belief, disbelief, unbelief. The last words are sometimes synonymous, but unbelief, in the sense of no belief, or a want of belief, is certainly distinguishable from disbelief. That state of mind which did not permit a man to say that he either believed or disbelieved a fact alleged to exist, or to have occurred, was recognized; and, in such a case, he could not be charged without proof. We can not suppose that our code intended to abrogate this well-known distinction and require a party either to believe or disbelieve an allegation, or, if unable to form a belief, to suffer the same consequences as if he did believe. Nor do we suppose it was intended to impose upon a person against whom a demand or charge was made, a duty, before unknown to our law, that of active diligence in acquiring knowledge, or obtaining information, which might induce a belief in the correctness of the demand or charge, and thus, by dispensing with further evidence, facilitate its enforcement. A party is permitted to assert in his pleading those facts only which he believes to exist, or to have occurred; he may deny those which he does not believe."²

The inquiry naturally arises whether or not perjury may be predicated upon a false statement in a pleading. That question seemed to have been taken into consideration by the code commissioners, who apparently thought that it could. But the language from Gholson, J., would seem to indicate otherwise. The verification provided by the code is not regarded as a positive verification, as shown by the fact that a different form is required when the verification to a petition for injunction takes the place of the affidavit required for that purpose, in which case the affidavit is made that the facts are true, not as the party believes.

Sec. 46s. Verification under the code.—Every pleading must be verified by the affidavit of the party, his agent or attorney,³ except in the case of a guardian defending for an infant

¹ Code Commissioners' Report, p. 64.

² Gholson, J., in *Treadwell v. Commissioners*, 11 O. S. 183.

³ O. Code, sec. 5102.

or a person of unsound mind, or an attorney of a person imprisoned; and in any case where the admission of the truth of a fact stated in a pleading might subject the party to a criminal or penal prosecution.¹ Pleadings in divorce proceedings need not be verified.² But when an injunction is sought a verification should be made to comply with the practice in injunction proceedings. A verification on behalf of a corporation may be made by an officer thereof or its agent or attorney.³ And when the state, or any officer thereof in its behalf, is a party, it may be made by any person acquainted with the facts, the attorney prosecuting or defending the action.⁴ It is no part of the petition, but is simply a proceeding required to secure a truthful statement of facts.⁵ The verification may be made by one of several parties united in interest,⁶ although this can not apply to those whose interests are several.⁷ A party in interest, even though not a party to the record, may verify.⁸ The verification may be made before a proper officer, excepting an attorney of a party,⁹ and must be subscribed and certified by the officer before whom it is taken.¹⁰ A pleading may be stricken from the files for want of verification,¹¹ although the omission may be supplied by amendment,¹² in which case a new summons must be issued.¹³ The omission of the word "plaintiff" in the verification is immaterial;¹⁴ and so with a verification in a petition upon which judgment is authorized to be confessed.¹⁵ An objection to a verification can not properly be raised on trial,¹⁶ the proper remedy

¹ O. Code, sec. 5103.

² O. Code, sec. 5697.

³ *Bank v. Rolling Mill Co.*, 2 O. N. P. 260. R. S. 5109 does not apply, 5102 governs.

⁴ O. Code, sec. 5102.

⁵ *Meade v. Thorne*, 2 W. L. M. 312, 313; *George v. McAvoy*, 6 How. Pr. 200; *Johnson v. Jones*, 2 Neb. 136.

⁶ O. Code, sec. 5104.

⁷ *Gray v. Kendall*, 10 Abb. Pr. 66.

⁸ *Taber v. Gardner*, 6 Abb. Pr. (N. S.) 147. As to verification by non-resident, see O. Code, sec. 5107; by agent or attorney, Code, sec. 5109.

⁹ *Meade v. Thorne*, 2 W. L. M. 312, 313; *Warner v. Warner*, 11 Kan. 121.

¹⁰ O. Code, sec. 5107.

¹¹ *Stevens v. White*, 1 W. L. M. 394; *Warner v. Warner*, 11 Kan. 121; *Pudney v. Burkhart*, 62 Ind. 179. A defective verification may be waived. *Hayward v. Grant*, 13 Minn. 165; *Smith v. Mullikin*, 2 Minn. 319.

¹² *White v. Freese*, 2 C. S. C. R. 30; *Boyles v. Hoyt*, 2 W. L. M. 548; *Kerns v. Roberts*, 3 W. L. M. 604. Where no verification has been attached or one which is null this can not be done. *Stevens v. White*, 1 W. L. M. 394.

¹³ *White v. Freese*, *supra*; *Kerns v. Roberts*, *supra*; *Stevens v. White*, *supra*.

¹⁴ *Lessem v. Wilson*, 43 Ia. 488.

¹⁵ *Bank v. Reed*, 31 O. S. 435.

¹⁶ *Schwarz v. Oppold*, 74 N. Y. 307; *Payne v. Flourney*, 29 Ark. 500.

being to dismiss the pleadings from the files as already stated. Verification of denials will be considered when that subject is reached.

Sec. 46t. Precipe—Indorsement on summons.—An action can only be commenced by the issuance of a summons, and we have shown in a previous section¹ that the action is commenced as of the date of the summons, and how important a part the summons plays in the commencement of an action. It is therefore essential that counsel be advised as to the requirements in the issuance and service of the summons. That “no clerk is bound to issue process without a precipe in writing filed as his authority and indemnity,” was early declared to be the rule.² And the statute requires that: The plaintiff shall also file with the clerk of the court a precipe, stating therein the names of the parties to the action, and demanding that a summons issue.³ The code also prescribes the requisites of the summons, and what shall be indorsed thereon when the action is for the recovery of money. In such actions there must be indorsed on the writ the amount of money claimed, which amount is to be stated in the precipe, for which, with interest, judgment will be taken if the defendant fail to answer.⁴ This requirement must be complied with before judgment can be taken against the defendant, if his appearance is not otherwise effected.⁵ This applies to all actions for money only, whether sounding in contract or tort.⁶ What would be the result if the defendant appeared in a case where this rule of the statute had not been complied with is not decided. In such case he enters his appearance and can be said to have full notice of all that the petition contains.⁷ What is the effect, then, of the irregularity in such case? Certainly none, if he controverts the merits of the case, as it is well settled that the appearance of a defendant in anywise questioning the merits of the case, even moving to dismiss for want of proper service, waives all irregularities and brings him into court. This matter is discussed at section 118 *post*. It has been held, however, with reference to this particular question where a party after service, without protesting against submitting himself to the jurisdiction of the court, files a motion to strike from the files the summons and

¹ *Ante*, sec. 7.

² *State v. Caffee*, 6 Ohio, 150, 154, 155.

³ O. Code, sec. 5036.

⁴ O. Code, sec. 5037.

⁵ *Finckh v. Evers*, 25 O. S. 82.

⁶ *Hamilton v. Miller*, 35 O. S. 87.

⁷ In both 25 O. S. 82 and 35 O. S. 87, the defendants failed to appear. But neither case decides the question just presented by the text.

return, and all the papers on the ground of irregularity, is an appearance in the action, precluding him from denying the jurisdiction of the court on the ground that the summons or service was defective.¹ Can a defendant file a motion for the purpose of quashing the service for the reason that it is irregular or not legal because of no indorsement? I would say that he could do so if he comes into court for the purpose of questioning the jurisdiction of the court, and not intending to enter his appearance in the case, and if he does not question the merits of the case in the least.

The statute in terms only requires an indorsement to be made in actions for the recovery of money only, but the precipe and summons in all cases ought to indicate what the prayer is. In foreclosure proceedings where no personal judgment is asked, it has been held not error if the amount is not indorsed,² and it has even been held that no indorsement need be made on the summons in an action to foreclose a mortgage where a personal judgment is asked.³ Default judgment can be taken only for the relief which is indorsed on the summons; the court will not enter up judgment in such case for other relief than that indorsed on the summons.⁴ It is not necessary for the clerk to sign the indorsement.⁵

Sec. 46*u*. Rule days.—Defendant must file an answer or demurrer on or before the third Saturday, and the reply or demurrer by the plaintiff on or before the fifth Saturday, after the return day of the summons, or service by publication.⁶ The rule day for filing a petition in the court of common pleas in a case appealed from a justice is the third Saturday after the expiration of the time limited for filing the transcript; and subsequent pleadings shall be filed within such times thereafter as is provided for the filing thereof in cases commenced in that court after the return of the summons.⁷ The answer or demurrer of a defendant to a cross-petition shall be filed on or before the third Saturday, and the reply or demurrer thereto on or before the fifth Saturday, after the cross-petition is filed.⁸ Where an answer demands affirmative relief, the plaintiff becomes defendant to the cross-petition and is given

¹ *Maholm v. Marshall*, 29 O. S. 611;
Evans v. Iles, 7 O. S. 233.

² *Conn v. Rhodes*, 26 O. S. 644.

³ *Larimer v. Clemmer*, 31 O. S. 499;

Maholm v. Marshall, 29 O. S. 611.

⁴ *Williams v. Hamlin*, 1 Handy, 96.

⁵ *Brolton v. Allston*, 2 W. L. M.
588.

⁶ O. Code, sec. 5097.

⁷ R. S., sec. 6598.

⁸ O. Code, sec. 5097.

the same time to plead as is allowed a defendant.¹ An answer day in *quo warranto* is within thirty days after the return day of the summons, and not the third Saturday.² A defendant is not excused from filing his answer within the rule merely because the plaintiff has failed to comply with an order for security for costs.³ The court, or a judge in vacation, is authorized, for good cause shown, to extend the time for filing any pleading upon such terms as are just.⁴ A defendant has the same time in which to answer or demur to a petition which has been amended as of right, or within ten days after a demurrer is filed, as to an original petition.⁵ It rests largely within the discretion of a court as to whether or not a pleading will be permitted to be filed after rule day, but a meritorious answer should never be refused.⁶ There being no time fixed by the statute (5114) authorizing the court to amend pleadings, or permit them to be amended, within which the adversary must answer or reply thereto, the time within which an answer may be filed to an amended petition permitted to be filed under 5114, is also within the discretion of the court. If no time be fixed, but the case is set for trial on a specified day, the action of the court in setting the case for trial will be construed in effect as an order that the issues be made up by that time.⁷ The court having power to grant leave to file a pleading out of rule, has also power to take it up and consider it when filed out of rule, without making any order on that subject, and when it shall have done so, by rendering judgment, the same will be conclusive, unless some method is taken in the court to set it aside.⁸

¹ Kimmel v. Pratt, 40 O. S. 344.

² O. Code, sec. 6772; State, etc., v. Robinson, 11 W. L. B. 294.

³ Newsom v. Ran, 18 O. 240.

⁴ O. Code, secs. 5098, 6773. As to interrogatories, see Code, sec. 5100.

⁵ O. Code, secs. 5111, 5112; 50 O. S. 394.

⁶ Hengehold v. Gardner, 4 W. L. B. 958.

⁷ Neininger v. State. 50 O. S. 394. Nash, J., in Mather v. Gallia Furnace Co., 1 W. L. M., 351, 353, said (and such has perhaps been the universal understanding of the bar, and the practice, until Neininger

v. State was decided), "that the defendant had the usual time for answer after every material amendment, whether that amendment is made under sec. 134 (5111) and 135 (5112) or in term time (5114), on leave obtained by the court." Since the ruling in Neininger v. State, it is necessary when a demurrer is sustained, and leave is given to amend a petition, that a time should also be fixed (in the entry) within which the defendant may file his answer, otherwise he might become in default.

⁸ Parker v. Haight, 7 Oh. Dec. 609.

PART 2. THE PETITION—RULES OF PLEADING.

Sec. 47. The cause of action. I endeavored to show the Cause of Action as a distinct and separate part of the petition at a former section,¹ and what constitutes the Cause of Action will now be explained. When once the mind is impressed with the essential elements of the cause of action, it will not be confused with the other formal parts of the petition, and the determination of the question whether a party has a cause of action which he may maintain, will be rendered an easier task. There are certain preliminary facts stated by way of inducement, as the capacity of parties, jurisdictional facts, when necessary to allege them, as also the prayer of the petition, which do not form any part of the cause of action. The Rules of Pleading which must be mastered, have to do almost solely with the statement of the cause of action. The Rules of Pleading either govern the statement of matter alleged by way of inducement, the cause of action, or the defense, counter-claim and set-off.

A perfect understanding of this matter is not alone useful to the student, but to the judge and lawyer as well. Questions are constantly arising whether the facts showing the infringement of a right constitutes a single cause of action or more. By keeping in mind the simple test by which to determine whether or not there is more than one cause of action, these questions may easily be solved.

An action is brought for the purpose of obtaining certain results. These results are called relief. The result rights the wrong which has violated or infringed the right. The distinction between the relief and the cause of action must be observed.

The violation of a legal right, or, as it is generally put, a primary right, constitutes the cause of action. It is not alone the wrong but the right and wrong together which constitutes the cause of action. We have cases illustrative of where the remedy and cause of action might easily be confused; but I do not agree with the argument and analysis of some writers upon this ques-

¹ *Ante* sec. 46-0.

tion, nor do the cases. It is said, for example, that where a mistake has been made in a written instrument, that reformation and recovery in damages or money may be had, but that there is but one cause of action, with two reliefs. Another familiar example is an action for the recovery of the possession of real property, with damages and rents and profits. This it is said constitutes a single cause of action, with several kinds of relief.¹

What constituted a cause of action under the common law—a violation of a primary right—constitutes a cause of action now under the code. Applying this test merely for purposes of illustration to the cases mentioned, I would arrive at a different conclusion from other writers. If a mistake is made a wrong has been suffered by the one who has the right to have the same rectified. The whole *extent* of that right is to have the instrument express what the parties mutually intended it should, so that the parties may then make use of the instrument as was contemplated. That is an absolute right which has been violated, and may be vindicated or remedied by a separate, independent suit in a court of equity. Under the old practice suit would have to have been brought in a court of equity, and there is nothing to indicate that a change was intended under the code by allowing the unison of legal and equitable causes. If there has been a mutual mistake, and the party complaining is entitled to relief on this account, he may or may not have occasion to enforce the obligations imposed by the instrument. If it is to pay money, or to perform some other act, a breach of which would entitle the party to money damages, then the party has a separate and distinct primary legal right, the violation of which constitutes a cause of action which may be brought separately or joined with the cause of action for equitable relief. These rights could have been vindicated at common law only by separate suits, one in a court of equity, and the other in a court of law. No one can deny that a separate suit may *now* be brought for reformation, and a separate suit for the recovery of money thereon. The authorities are not in accord upon this matter.² The action for the recovery of the possession of real property has been elsewhere explained.³ This class of cases must not be confused with another, where from the violation of the same right there may arise either of two kinds

¹ Pomeroy's Code Rem. sec. 454.
459.

² See sec. 24, *ante*. Pomeroy's
Code Rem., sec. 459.

³ See *ante* sec. 30.

of relief. As where a contract is made which is not performed, there may be specific performance or money damages.

If one wrong infringes two legal rights, there are then two causes of action. All we have to do is to ascertain and separate the primary right or rights which have been violated, and for each right there is a separate cause of action.¹

Sec. 48. The same—Primary right explained.—The primary right, the violation of which constitutes the cause of action, must be a legal right. It is such a right as the power of the State will protect, and compel such acts or forbearances on the part of others as may be necessary to its enforcement. The State will not lend its aid in this behalf unless such other persons owe a *duty* to the one complaining of the violation of the right. The legal or primary right arises from a legal duty. This duty may arise from terms imposed by the parties themselves, or from a duty imposed by law. It is, then, the legal duty which gives rise to the legal right, which with the wrong constitutes the cause of action.²

Sec. 49. Of the statement of the cause of action.—The manner of setting forth the Cause of Action under the code is called the Fact system. The section of the Ohio code first passed provided that: The *rules of pleading* heretofore existing in civil actions, are abolished; and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by the code.³ It now reads, the *forms of pleading* heretofore existing, etc. The code aimed to destroy the evils of Special and General pleading. "The court and jury want, and written pleadings should present, a clear, plain and concise statement, just such a statement as the lawyer often makes at the opening of the trial. This is what the pleadings should give—'a statement of the facts constituting the cause of action or defense in ordinary and concise language, and without repetition,' and this is what we require them to give."⁴ This matter has been more thoroughly explained from a historical standpoint at another place to which reference is invited in this connection.⁵

¹ See Pomeroy's Code Rem., sec. 457.

² See *Veeder v. Baker*, 83 N. Y. 156; *Railroad Co. v. Rice*, 36 Kan. 593; *Marquat v. Id.*, 12 N. Y. 341,

for explanation of "Cause of Action."

³ Sec. (83) 5057.

⁴ Code Com. Rep., 52.

⁵ *Ante* sec. k, intro. ch.

Sec. 49-1. To what extent are common-law rules changed, or applicable under the code.—It would appear from the language of the code given in the preceding section that the common-law rules of pleading were entirely abolished. There appears to be some significance in the fact that the words: "The rules of pleading heretofore existing in civil actions are abolished," were dropped from the section, leaving only the language: "The forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by the code."¹ Two views have been taken of the provision of the codes upon the question as to whether any of the rules of the common law are still in force; one, that the rules of common law and equity are still in force so far as they are still applicable under the code; the other, as the code provides, that they are no longer in force and applicable to the new procedure. The latter seems to be the conclusion most generally reached by the courts.² There is no doubt of the prop-

¹ Code, sec. 5057.

² Swan, J., in *Trustees v. Odlin*, 8 O. S. 293, 297, said: "We suppose the common-law rule as to the construction of pleadings under the code is entirely abrogated. If pleadings shall be in ordinary language, as contradistinguished from legal technical language, they must be construed as meaning what is generally understood by ordinary language, and hence there can be no established technical mode of stating a cause of action or defense. So, too, the rules of the common law, as to the sufficiency of pleadings, are abrogated, and in their place is substituted the few and simple rules of the code. Code, sec. 83. Whatever rules of common-law pleading are in accordance with the rules of the code, they are still applicable to pleadings under the code; not, however, as common-law rules, but as rules of the code. Thus the rules of common-law pleading which illustrate and vindicate the law that the facts which constitute a cause of action shall be set forth in the declaration, may be applica-

ble to a petition under the code. But the language to be used in stating the cause of action is prescribed by the code, and the common-law rules in that respect are entirely inapplicable."

"During the earlier periods of the present system there was an evident disposition on the part of some judges and courts to * * * hold that the old methods, rules and requisites of the common law and of equity are still applicable in substance when not inconsistent with the provisions of the statute, or, in other words, that they had been supplanted only so far as such inconsistency extends. * * * It may now, I think, be regarded as the established doctrine that the code in each of the states is the only source of authority from which rules of pleading may be drawn, that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority." *Pomeroy's Code Rem.*, sec. 515, and cases.

position so frequently asserted that the same facts which constituted a cause of action at common law will constitute a cause of action under the code, the only difference being in the manner and form of statement.¹ But what changes have been made in the rules of pleading and to what extent any of the common-law rules remain in force will appear in the discussions throughout this work.

Sec. 49-2. Facts showing legal duty and legal right must be stated.—The facts which must be stated are those ultimate—not evidentiary—facts which show that one owes another a legal duty, which give rise to the legal right, the infringement of which constitutes the cause of action. Much time and labor will be saved if it is always remembered that the *legal duty*—which gives rise to the cause of action—must not be stated in terms or effect, but only the *facts*, which show the commission of some wrong or the violation of some contractual obligation, should be alleged. It is for the court and not the pleader to draw its conclusion, and to say whether there was a legal duty owing, and consequently a legal right and cause of action in favor of the complainant. It would be improper to allege in terms that the defendant owed a certain duty to the plaintiff to do a particular thing.² There must of necessity be sufficient facts alleged to constitute a cause of action, and the pleading should be incumbered with no more than is necessary. As to this the pleader must be the judge in the first instance. In some instances it may be difficult to separate and cull the necessary facts; it is only such facts as will disclose the legal duty and the consequent legal right. In order to do this, therefore, recourse must be had to the substantive law, and the statement must be confined to the facts which are found by the rules and principles of substantive law, define and prescribe legal duty and legal right. This shows the close relation existing between substantive law and adjective law, which the author considers justifies a somewhat extensive treatment of legal duty and rights in the chapters treating many of the special subjects in this work.

¹ Hill v. Barrett, 14 B. Mon. 83, is an instructive case.

² Farron v. Sherwood, 17 N. Y. 227, 230.

Sec. 50. Statement of facts—General observations and rules.—It would seem that the language of the code that the petition must contain “a statement of the facts constituting the cause of action in ordinary and concise language” would not need much elucidation. Yet it is one of the most difficult tasks to determine just what should be stated. There can only be a few well known rules observed here, the more detailed discussion being treated in the chapters on the particular actions. A fact in a pleading is a circumstance, act, event or incident.¹ The old rules of pleading required that it should be stated when every material fact happened. This is only necessary under the present system when time may be the essence of a contract, or the time when a fact happened is material.² And if not so stated the pleading will be demurrable.³ That the allegation of ownership is the statement of a fact can hardly be questioned,⁴ but it is not necessary to show how title is acquired.⁵ It is essential that all of the facts necessary to be proved to make a cause of action should be stated,⁶ which means those facts which the evidence upon the trial will establish and not the evidence which will be required to prove their existence.⁷ A failure to allege an essential fact will prove fatal, as proof of any fact not set forth cannot be offered.⁸ The petition must of course contain a cause of action in favor of the plaintiff.⁹ But there

¹ *Drake v. Cockroff*, 10 How. Pr. 377; *Garrity v. Grady*, 44 Ill. App. 203. A mere statement that an injury is irreparable is not the statement of any fact. *Van Wert v. Webster*, 31 O. S. 420. An averment of reorganization of a corporation is a fact and not a conclusion (*Hyatt v. McMahon*, 25 Barb. 458); and so with an allegation as to unsoundness of mind. *Riggs v. American Tract Society*, 84 N. Y. 230; *In re Gharky*, 57 Cal. 274.

² *People ex rel. v. Ryder*, 12 N. Y. 434.

³ *Patterson v. Baker*, 3 Hun, 398.

⁴ *Swan's Pldg.* 156; *Hume v. Watt*, 5 Kan. 40; *Commissioners v. Young*, 18 Kan. 444, 445.

⁵ *Malcolm v. O'Riley*, 89 N. Y. 156.

⁶ *Prindle v. Carruthers*, 15 N. Y. 425-27; *Griggs v. St. Paul*, 9 Minn. 246.

⁷ *Wooden v. Strew*, 10 How. Pr. 48.

⁸ *Bailey v. Ryder*, 10 N. Y. 363-70.

⁹ *Weidner v. Rankin*, 26 O. S. 522; *Tye v. Catching*, 78 Ky. 463.

is no technical mode of stating it, and according to the code it should be in ordinary rather than technical language.¹ A petition, though inartistically drawn, which contains facts sufficient, if properly stated, to constitute a cause of action, will support a judgment.²

Sec. 50a. Statement of facts continued—Legal effect.

—Whenever the rules of common-law pleading are in accordance with the code system they are still applicable and may be followed.³ While pleading legal conclusions and according to the legal effect were evils of the common law which the new system designed to discard, there was a rule connected with this subject at common law, which is still retained under the code, that was free from objection. It is held under our present system that a party should state the actual facts which give rise to a cause of action in his favor as they occurred, rather than their legal effect,⁴ and that the pleading will not be demurrable if it does not state the legal effect thereof.⁵ In fact this is pronounced by different writers as the better rule.⁶ We may safely say that the general rule is that the legal effect of a contract, oral or written, should not be stated. Yet there are exceptions still under the code to this rule. It is considered still proper pleading under the code, in some instances, to state the facts according to their legal effect without giving evidence, circumstances, arguments or inferences,⁷ as for instance in stating a cause of action upon a contract of sale, or in fact upon any kind of contract, it is not necessary to state how the sale or the contract was made, whether through an agent or otherwise, but simply that the sale or the contract was made.⁸

There are at least two instances where our courts still sanction pleading according to the legal effect: 1. In the use of the common counts; 2. Where the legal effect of the facts and the facts are so closely allied or blended together that it is difficult, if not quite impossible, to separate them in the allegation.

¹ *Trustee v. Odlin*, 8 O. S. 297.

⁷ *Railroad Co. v. Robinson*, 133

² *Youngstown v. Moore*, 30 O. S. 133.

N. Y. 242 (1892); *Thayer v. Gile*, 42 Hun, 268, 1886; *Boyce v. Brown*, 7

³ *Trustee v. Odlin*, 8 O. S. 29.

Barb. 80 (1849); *Gasper v. Adams*,

⁴ *Barney v. Worthington*, 37 N. Y. 112-116.

28 Barb. 441; *Brown v. Champlin*, 66 N. Y. 214-219; *Pomeroy's Code*

⁵ *Hemingway v. Poucher*, 98 N. Y. 281.

Rem., sec. 537.

⁶ *Sherman v. Railroad Co.*, 23 Barb.

⁶ *Pomeroy's Rem.*, sec. 537; *Bryant's Code Pldg.*, p. 187.

239; *Railway Co. v. Nickless*, 73 Ind. 382.

In the use of the common counts at common law the legal effect of the facts only was stated, and the use of the common count *in assumptit* under the code has been approved by many authorities,¹ such pleading being regarded at least good as against a demurrer, in the absence of a motion to make definite and certain, though not to be encouraged.² As to the second class, where the allegation contains an admixture of fact and law, being a proper course of pleading, the author is content to rest upon the argument of the most excellent authority cited in the note.³

Sec. 506. Statement of fact continued.—It is essential that only the ultimate or issuable facts be stated. Those facts, therefore, which lie behind or transpire before the ultimate one are only probative and constitute the evidence; and this has no place in a pleading, tenders no issue, but detracts from the simplicity and logical directness which should be observed.⁴ Hence it follows that the evidence, or rather evidential facts, must not be stated.⁵ In pleading fraud the facts from which the inference of fraud is derived may be stated without designating them as fraudulent;⁶ nor is it necessary to state the manner in which the fraud was discovered, as it is no element of the action.⁷ If an action be founded upon a statute, it is essential that every fact necessary to bring the case within the statute should be stated.⁸ If in any case a petition does not contain facts sufficient to constitute an action, merely filing an answer will not constitute a waiver of that defect.⁹ But it is sufficient if the facts stated in the petition warrant the judgment, although the grounds upon which it was rendered were other than those contemplated by the

¹ Pomeroy's Code Rem., sec. 542, note 1, where many authorities are collected.

² McNutt v. Haufman, 26 O.S. 127; Swan's Pl. and Pr. 177; Hazen v. O'Connor, 14 O. C. C. 529-531.

³ Swan's Pl. and Pr., pp. 150-159.

⁴ Miles v. McDermott, 31 Cal. 271; Osborn v. Clark, 60 Cal. 622; Cowie v. Toole, 31 Ia. 513-16.

⁵ Kansas, etc., Ry. Co. v. McCormick, 20 Kan. 107; Badeau v. Niles, 9 Abb. N. C. 48; Ensign v. Dickinson, 19 N. Y. S. 438; Hyatt v. Mc-

Mahon, 25 Barb. 458. A statement of evidence can only be justified when it is such that the conclusion of facts necessary to sustain the action must inevitably follow. Zimmerman v. Morrow, 28 Minn. 367.

⁶ Whittlesay v. Delaney, 73 N. Y. 571.

⁷ Kansas, etc., Ry. Co. vs. McCormick, 20 Kan. 107-11.

⁸ Brown v. Harman, 21 Barb. 508.

⁹ Farrar v. Triplett, 7 Neb. 240; O'Donahue v. Hendrix, 13 Neb. 255.

pleader.¹ It is a fundamental rule that facts must be stated directly, definitely and positively,² only what the party knows to be the truth, and not in different forms to meet different constructions, as was formerly done;³ nor upon mere belief.⁴ When this rule is violated the remedy is by motion to make definite and certain, and not by demurrer.⁵ In some instances where facts have been defectively alleged, and no objection has been made by motion or otherwise, they will be cured by the evidence and verdict.⁶ This cannot be the case, however, where allegations of material facts essential to the maintenance of an action have been omitted.⁷ And where a petition is challenged after answer by an objection to the introduction of evidence that it does not state facts sufficient to constitute an action, it should be liberally construed for the purpose of sustaining the same.⁸ But every material averment in a petition which is not denied by answer will be taken as true for the purpose of the action.⁹ It is also a well established rule that an omission of a material fact in the petition, or a defective allegation, will be cured when the same is shown in the answer.¹⁰ But the allegations in an answer cannot cure defects in a petition, where the plaintiff by reply denies the averments in the answer.¹¹

¹ Wright v. Hooker, 10 N. Y. 51. Hyndman v. Timme, 35 N. E. Rep. 1046 (Ind., 1893).
As where the fact stated was an action on contract, although in form it was for a conversion. Con-

² Railroad Co. v. McCaffery, 72 Ind. 294; Morrison v. Collier, 79 Ind. 417; Trammel v. Chipman, 74 Ind. 474; Railroad Co. v. Noel, 77 Ind. 110.
³ Stoutenburg v. Lybrand, 13 O. S. 228-33; Bank v. Oliver, 1 Disn. 159.

⁴ Cox v. Hunter, 79 Ind. 590.
⁵ Dunning v. Thomas, 11 How. Pr. 281.
⁶ Robbins v. Barton, 50 Kan. 120.

⁷ Livesay v. Brown, 35 Neb. 112; Cobbey v. Wright, 34 Neb. 771.
⁸ Truscott v. Dole, 7 How. Pr. 221.

⁹ Stoutenburg v. Lybrand, 13 O. S. 228; Bank v. Smith, 36 Neb. 199 (1893); Smith v. Woodruff, 1 O. S. 293; Lewis v. Coulter, 10 O. S. 451; Bank v. Bell, 14 O. S. 208;
¹⁰ Barrett v. Lingle, 33 Ill. App. 91; Strauss v. Trotter, 26 N. Y. S. 20; Allen v. Choteau, 102 Mo. 309; Salazar v. Taylor, 33 Pac. Rep. 369 (Colo., 1893).
¹¹ Mossness v. Ins. Co., 52 N. W. Rep. 932 (Minn., 1892).

Sec. 51. Conclusions of law should not be pleaded.—

It is a well understood rule that facts only should be pleaded, and not conclusions of law—such facts as are capable of proof and will establish a conclusion of law.⁶ A statement of a conclusion of law is usually of a right or liability flowing from certain facts and is subject to a demurrer.⁷ The pleader should not state propositions of law, or the law upon which he relies.⁸ The rule is well established, but the difficulty lies in its application and in determining what are conclusions of law, so that mere illustrations need here be given. For example, merely setting out a copy of a contract, stating that a defendant thereby became liable—the promise must be alleged.⁹ And so with an allegation that a contract is void for want of consideration,¹⁰ or a general averment of the requirements of a statute.¹¹ It should not be stated that a person is bound to do a certain thing enjoined by statute, but the facts showing the liability should be set forth.¹² A general allegation that a defendant neglected and refused to do an act according to the terms of an agreement is also a conclusion.¹³ And so with an allegation that the defendant is indebted to plaintiff and that the debt has not been paid;¹⁴ or that there

⁶ Baylies' Pleading, sec. 6; Lawrence v. Wright, 2 Duer, 673; Clay Co. v. Simonsen, 1 Dak. T. 403; Gerity v. Brady, 44 Ill. App. 203 (1892).

⁷ Moore v. Hobbs, 79 N.C. 535.

⁸ People v. Commissioners, 54 N.Y. 276; Hemmingway v. Poucher, 98 N.Y. 287.

⁹ Bean v. Ayers, 67 Me. 483.

¹⁰ Hammond v. Earle, 58 How. Pr. 426.

¹¹ State v. Hudson, 13 Mo. App. 61.

¹² B. & O. R. R. Co. v. Wilson, 31 O. S. 555.

¹³ Wilson v. Clarke, 20 Minn. 367; Van Schaick v. Winne, 16 Barb. 90 (1852).

¹⁴ Moore v. Hobbs, 79 N.C. 65; Butts v. Phelps, 79 Mo. 302; Brashers v. Strock, 46 Mo. 221; Roberts v. Treadwell, 50 Cal. 520. Lie-nan v. Lincoln, 2 Duer, 670.

is nothing due;¹ or that a contract is not in any manner binding, or that defendant is not liable;² or that plaintiff is entitled to the possession of land and to the rents and profits thereof;³ or an allegation in an action for a personal injury from a sidewalk that "then and there, and long prior thereto, it had been the duty of said defendant to keep said sidewalk in safe condition;"⁴ or that a warrant is illegal, null and void and issued without authority of law;⁵ or that a certain thing is illegally done;⁶ or that an attachment was illegal, unauthorized and void;⁷ or that certain parties became subscribers to capital stock of a corporation by signing and delivering an agreement among themselves;⁸ or that an assessment has been increased by reason of illegal actions, frauds and irregularities of the officers.⁹ And so with a denial that an appraisal was illegally and duly made;¹⁰ or that plaintiff is the actual legal, *bona fide* holder of a note.¹¹ A demurrer will not admit the truth of conclusions of law.¹²

Sec. 52. Material allegations.—A material allegation is defined by the code to be one essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient.¹³ Each allegation contained in the petition when not controverted by answer for the purpose of the action is taken to be true;¹⁴ and so with allegations of new matter in the answer not controverted by the reply; but not as to new matter in the reply, which is deemed controverted by force of the statute.¹⁵ An allegation of the execution of written instruments and of the existence of a corporation is taken to be true

¹ *Larimore v. Wells*, 29 O. S. 13.

² *Rolling Stock Co. v. Railroad Co.*, 84 O. S. 450-67; *Bank v. Lloyd*, 18 O. S. 353; *Railroad Co. v. Wilson*, 31 O. S. 555; *Railroad Co. v. Walker*, 45 O. S. 583.

³ *Sheridan v. Jackson*, 72 N. Y. 170; *Scofield v. Whitelegge*, 49 N. Y. 259.

⁴ *Sammins v. Wilhelm*, 6 O. C. C. 545.

⁵ *In re Denny*, 10 Nev. 212; *Pelton v. Bemis*, 44 O. S. 51.

⁶ *Bowers v. Smith*, 20 S. W. Rep. 101 (Mo., 1892).

⁷ *Sprague v. Parsons*, 12 Daly, 392;

Hammond v. Earle, 58 How. Pr. 426.

⁸ *Wheeler v. Mining Co.*, 9 Nev. 254.

⁹ *Knapp v. Brooklyn*, 97 N. Y. 520; *Swart v. Schermerhorn*, 35 Hun, 281.

¹⁰ *Trustees v. Odlin*, 8 O. S. 293.

¹¹ *Downer v. Reed*, 17 Minn. 493, 494.

¹² *Pettersen v. Roach*, 82 O. S. 374; *Smith v. Henry Co.*, 15 Ia. 385.

¹³ O. Code, sec. 5082.

¹⁴ O. Code, sec. 5081; *Lumber Co. v. Town Co.*, 51 Kan. 394.

¹⁵ O. Code, sec. 5082.

unless denied.¹ A failure to plead a material fact raises a presumption that it does not exist.²

Sec. 53. Pleading statutes—Some judicially noticed.— It is an established rule that it is not necessary to plead those things of which courts take judicial notice.³ A fact which is judicially noticed⁴ is to be regarded as matter of law, and therefore cannot be pleaded.⁵ Judicial notice will be taken of general, local or special statutes, which need not, therefore, be pleaded.⁶ But judicial notice cannot be taken of the laws of a sister state,⁶ or of a foreign country,⁷ or of a private statute,⁸ or of laws published but not properly certified,⁹ all of which must be specially pleaded as other facts. Judicial notice not being taken of municipal ordinances, they also must be specially pleaded when made the basis of a liability.¹⁰ And so with a charter or foreign franchise.¹¹ The following rules should be observed in pleading statutes: In the case of a foreign statute it is not necessary to set forth an exact copy, but only its substance may be stated, making such reference that it may be clearly identified.¹² It is also essential that the construction given it by the courts of a sister state be stated;¹³ and no inquiry can be made as to the correctness thereof.¹⁴ If it be claimed that a law of a sister state relieves a person from a liability,

¹ *Lumber Co. v. Town Co.*, 51 Kan. 394.

² *Railroad Co. v. Lancaster Co.*, 4 Neb. 307; *Cheney v. Dunlap*, 21 Neb. 404.

³ O. Code, sec. 5083.

⁴ *Cooke v. Tallman*, 40 Iowa, 138; *Shaw v. Tobias*, 3 N. Y. 188.

⁵ *Jones v. Scudder*, 2 C. S. C. R. 178 (1872); *Shaw v. Tobias*, 3 N. Y. 188; *Brown v. State*, 11 O. 280. Of acts of incorporation. *Brown v. State*, 11 O. 276. Of canal laws. *State v. Perry*, W. 662; *Division of Howard Co.*, 15 Kan. 195.

⁶ *Shed v. Augustine*, 14 Kan. 282; *Railroad Co. v. Lewis*, 33 O. S. 196; *Williams v. Finlay*, 40 O. S. 342.

⁷ *Evans v. Reynolds*, 32 O. S. 163; *Monroe v. Douglas*, 5 N. Y. 447.

⁸ *Railway Co. v. Moore*, 33 O. S. 384; *Railroad Co. v. Blackshire*, 10 Kan. 477-87.

⁹ *State ex rel. v. Kieseewetter*, 45 O. S. 254.

¹⁰ *Richter v. Harper*, 54 N. W. Rep. 768 (Mich., 1893). So with municipal by-laws. *Harker v. Mayor*, 17 Wend. 199; *People v. Mayor*, 7 How. Pr. 81.

¹¹ *Devoss v. Gray*, 22 O. S. 159.

¹² *Minn. H. Works v. Smith*, 54 N. W. Rep. 973 (Neb., 1893).

¹³ *Smith v. Bartram*, 11 O. S. 690; *Bank v. Baker*, 15 O. S. 68; *Williams v. Finlay*, 40 O. S. 342; *Whelan v. Kinsley*, 26 O. S. 131; *James v. Railroad Co.*, 2 Disn. 261-2.

¹⁴ *Bank v. Baker*, 15 O. S. 68.

the state of the law when the same is supposed to have arisen should be given.¹ It is not proper to allege that under the law of another country plaintiff is entitled to relief hereinafter prayed for.² In pleading a private statute it should be referred to by its title and date of its passage.³ Every fact necessary to show that a case is clearly within a statute should be stated.⁴ Where an action is brought under a general statute it is not necessary to plead or refer to the same in any manner.⁵ And where the provision in a statute restrictive of a right of recovery against the defendant is in a separate clause from that giving the right of action, it should be introduced by the defense.⁶

Sec. 54. Other matters judicially noticed.— Courts generally take judicial notice of such facts or conclusions from facts as are not proper objects of evidence. This will include matters of public history of the country,⁷ civil divisions of the state,⁸ the executive of a state,⁹ and other public officers;¹⁰ of election days;¹¹ the various arts and sciences;¹² the commencement of a term of court, though not of its duration;¹³ all prior proceedings in a case;¹⁴ the genuineness of the records of a court;¹⁵ seals of foreign states;¹⁶ acts of contempt committed in the presence of the court;¹⁷ and of a municipal charter ore-

¹ *Railroad v. Lewis*, 33 O. S. 196.

² *Riendeau v. Vieu*, 21 N. Y. S. 506.

³ O. Code, sec. 5092; *Railway Co. v. Moore*, 33 O. S. 384.

⁴ *Austin v. Goodrich*, 49 N. Y. 266.

⁵ *Denver, etc. R. R. Co. v. DeGroff*, 29 Pac. Rep. 664 (Colo., 1892); *Clark v. North Muskegon*, 50 N. W. Rep. 254 (Mich., 1891); *Hayes v. Bay City*, 91 Mich. 418; 51 N. W. Rep. 1067 (1892).

⁶ *Clark Thread Co. v. Board, etc.*, 28 Atl. Rep. 820 (N. J., 1892).

⁷ *Ludlow v. Brewster*, 3 O. C. C. 82-4; *Sperry v. Tebbs*, 20 W. L. B. 181; *Swinerton v. Insurance Co.*, 37 N. Y. 174; *Rice v. Shook*, 27 Ark. 137; *People v. Snyder*, 41 N. Y. 397.

⁸ *Hinckley v. Beckwith*, 23 Wis. 328; *W. Lake Co. v. Young*, 40 N. H. 420.

⁹ *Dewees v. Colorado Co.*, 33 Tex. 570.

¹⁰ *People v. Johr*, 22 Mich. 461; *Ragland v. Wynn*, 37 Ala. 182; *Gilliland v. Adm'r*, 2 O. S. 223.

¹¹ *Ellis v. Reddin*, 12 Kan. 307.

¹² *Luke v. Calhoon Co.*, 52 Ala. 115; *People v. Chee Kee*, 61 Cal. 404; *Buf-fitt v. State*, 46 Am. Rep. 631.

¹³ *Spencer v. Curtis*, 57 Ind. 221; *Gilliland v. Adm'r*, 2 O. S. 223; *Davidson v. Peticolas*, 34 Tex. 27. See *Kent v. Bierce*, 6 O. 336.

¹⁴ *Kansas v. Bowen*, 16 Kan. 475.

¹⁵ *State v. Schilling*, 14 Ia. 455-6; *State v. Bowen*, 16 Kan. 475; *Robinson v. Brown*, 82 Ill. 279.

¹⁶ *Lazier v. Westcott*, 26 N. Y. 146; *Stanglein v. State*, 17 O. S. 463.

¹⁷ *Myers v. State*, 46 O. S. 473.

ated by public act.¹ Judicial notice cannot be taken of statements published in the report of a state commissioner of railroads,² nor of the names of navigable rivers,³ nor of facts of recent occurrence relating to a particular section of country,⁴ nor of municipal ordinances,⁵ nor of the width of streets or sidewalks of a city,⁶ nor of the population of a city according to any particular census.⁷

Sec. 55. Presumptions of law should not be stated.— Presumptions of law,⁸ that is, whatever the law presumes to be a fact, should not be pleaded. For example, it is presumed that a seal of a corporation affixed to a deed was so affixed by authority.⁹ And so with official acts,¹⁰ ownership of a note,¹¹ or that it is in writing,¹² or that an act of the legislature was passed by the requisite vote.¹³ A presumption of death exists where a husband leaves his family and residence, and is not heard from for a period of seven years.¹⁴ While presumptions of law need not be stated, this does not apply to presumptions of fact.¹⁵

Sec. 56. Redundant and irrelevant matter.— The code prohibits the insertion of redundant, irrelevant, scurrilous or obscene matter in a petition.¹⁶ Redundancy consists of needless repetition of material averments;¹⁷ and matter incorporated into a pleading which has no connection or bearing on the subject-matter of an action may be considered irrelevant.¹⁸ An answer may be frivolous, but not necessarily irrelevant.¹⁹ Allegations which are unnecessary, yet qualify and restrict other allegations, so as to show that the plaintiff's relief is barred, cannot be rejected on demurrer as surplusage.²⁰ This subject is treated elsewhere.²¹

¹ *Montgomery v. Wright*, 72 Ala. 411.

² *Railroad Co. v. Hoffhines*, 46 O. S. 643-50.

³ *Raccoon River Nav. Co. v. Eagle*, 29 O. S. 233.

⁴ *Morris v. Edwards*, 1 O. 189.

⁵ *Garvin v. Wells*, 8 Ia. 286; *Porter v. Warring*, 69 N. Y. 250.

⁶ *Porter v. Warring*, 69 N. Y. 250.

⁷ *Bolton v. Cleveland*, 35 O. S. 312.

⁸ O. Code, sec. 5083.

⁹ *Sheehan v. Davis*, 17 O. S. 571.

¹⁰ *Reynolds v. Schweinefus*, 27 O. S. 311.

¹¹ *Bank v. Wadsworth*, 24 N. Y. 547.

¹² *Bank v. Edwards*, 11 How. Pr. 216.

¹³ *Steamboat Northern Indiana v. Millikin*, 7 O. S. 883.

¹⁴ *Rosenthal v. Mayhugh*, 33 O. S. 155.

¹⁵ *Draper v. Cowles*, 27 Kan. 483.

¹⁶ O. Code, sec. 5087.

¹⁷ *Bowman v. Sheldon*, 5 Sand. (N. Y. Super.) 657-60.

¹⁸ *Fasnacht v. Stehn*, 53 Barb. 650.

¹⁹ *Id.*

²⁰ *Gray v. Ulrich*, 8 Kan. 112.

²¹ See *post*, sec. 121.

Sec. 56-1. Ordinary and concise language means what.

—The kind of language which the code contemplates or requires shall be used in pleading is such as intelligent, educated men use, not technical and artificial. Language used in a pleading is to be considered in precisely the same light as it is when used by plain, sensible people in the common affairs of life. It is construed by courts exactly in the same manner as it is used and understood by intelligent men; they are not hypercritical, nor do they indulge in a mere verbal criticism of words.¹

Sec. 56-2. Construction of pleadings.—When codes were adopted new methods of construction of pleadings were also adopted. It was enacted that: The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties.²

While the common-law rule that pleadings must be considered most strongly against the pleader has been abrogated, under the present system it is not necessary to consider every equivocal word or phrase most strongly in favor of the pleader; but the meaning must be fairly ascertained with regard to technical rules from the whole pleading, giving to legal and technical words their ascertained meaning, unless the text shows that they were used in some other sense.³ While the hand of innovation has done its work upon the old system so far as forms are concerned, yet we must think and act very largely in the old terms and actions.⁴ The object of pleading is to reach a specific and definite issue upon a material fact constituting the subject-matter of dispute, which should be done in their logical order, with clearness and precision.⁵ The character of a pleading should be determined by its allegations, not by any name which may be given it.⁶ The averments should be consistent.⁷ The facts alleged, when material, will always control rather than the conclusions of the pleader.⁸ A petition which has been attacked after answer filed, because it does not state facts sufficient to constitute a cause of action, should be liberally construed.⁹

¹ See Swan's Pl. and Pr., 130-138.

² Code, sec. 5096; Stoutenburg v. Lybrand, 13 O.S. 228-33. They must be fairly and reasonably construed, not strictly. McCurdy v. Baughman, 43 O.S. 78; Crooks v. Finney, 39 O. S. 57; Robinson v. Greenville, 42 O. S. 625.

³ Robinson v. Greenville, 42 O. S. 625.

⁴ Biddle v. Boyce, 13 Mo. 532.

⁵ Railroad Co. v. Wilson, 31 O. S. 555-9.

⁶ Cincinnati v. Cameron, 33 O. S. 336.

⁷ Rutledge v. Railway Co., 110 Mo. 312.

⁸ Spargur v. Roman, 57 N.W. Rep. 523 (Neb., 1894).

⁹ Robbins v. Barton Bros., 50 Kan. 120.

A pleading must not only be judged by its general scope,¹ but the language used must be given a reasonable and fair construction. If it can be construed so as to withstand a demurrer, the same should be overruled. This is not inconsistent with the rule that when doubts arise upon pleadings, or where they are ambiguous, they are to be construed most strongly against the pleader.² Although the language must be construed in its popular and ordinary meaning, that meaning must conform substantially to the proof.³

Sec. 56-3. Duplicity—The common law.—The primary object of pleading is to present to court or jury a single issue or question. It was a rule at common law that pleading should not be double, and the purpose or object of the rule was to accomplish the object of pleading, namely—singleness of issue. One might at first suppose that the rule against duplicity did not prevail at common law, as so much stress is laid under the code upon the rule against it. Another object of the rule was to prevent confusion at the trial.⁴

Duplicity, or double pleading, means to allege two or more grounds for the support of a single claim or defense.

A practice was adopted in the common law to avoid the effect of this rule, which consisted in stating the facts constituting a single cause of action in different form as separate counts as though they were separate causes of action. That is, the facts constituting a single cause of action were subdivided so as to present fictitiously two or more causes of action.⁵ This was the common-law practice when the code was adopted and which the latter designed to and did abrogate.

Not only did the rule against double pleading apply to the declaration but to all subsequent pleadings, the plea,⁶ replication, and rejoinder. The remedy for duplicity at common law was by special demurrer, the defect being regarded as one of form.

Sec. 56-4. The same—The rule against duplicity under the code.—There was some merit in double pleading or the duplicate statement of a single cause of action. There might be more than one ground upon which a recovery could be based, and the

¹ *Rolet v. Heinman*, 120 Ind. 511; *Bank v. Root*, 107 Ind. 224; *Railway Co. v. Schmidt*, 106 Ind. 73.

² *State v. Casteel*, 110 Ind. 174; *Railway Co. v. McDaniels*, 32 N. E. Rep. 728 (Ind., 1892).

³ *Hill v. Supervisor*, 10 O. S. 621.

⁴ *Richmond v. Patterson*, 3 O. 369.

⁵ *Sturges v. Burton*, 8 O. S. 215; *Stephen Plg.*, 254.

⁶ "To make a good plea * * * it must be single and contain but one matter, because duplicity begets confusion." *Bumbarger v. Stiver*, 8 O. 99, 100; 3 Bl. Com. 308; 7 Enc. of Pl. and Pr., 241.

party not being certain which theory or ground the evidence would prove was enabled by this method to state his case so as to meet any phase which the evidence might support. There might be an uncertainty as to which is the proper ground upon which to base the right of recovery. A practice prevailed in the Chancery Courts which allowed a party to set forth his claim in the alternative, and recover upon whatever the evidence substantiated. The grounds upon which recovery was based were inconsistent, but the relief claimed was consistent with the case made.¹ As stated in the preceding section, double pleading, duplicity or alternative pleading, as it was practiced at common law was abrogated by the code.² The facts must now be stated without repetition. Practically the rule against double pleading means this. The plaintiff having but a single cause of action, can not state his grounds of action alternatively, as in tort, or in contract, or in equity, so as to meet any phase the evidence might take. These grounds are inconsistent with each other and hence can not be declared upon in this manner, but plaintiff must elect upon which he will rely.³ The defendant has the right to know upon what theory plaintiff bases his cause of action which is indicated by the indorsement on the summons,⁴ and hence the pleading should be upon a definite theory.

The rule against duplicity does not prevent a plaintiff who may have more than one ground upon which he can base his right to recover from setting them forth. This may be done where he can not safely determine before the development of the trial which will prove to be the true nature of the transaction. This is not a rule of very extensive application. Authorities and illustrations are given in the note.⁵

Duplicity being merely a formal defect, was remedied at common law by special demurrer; under the code by motion to strike out or to make a separate statement, or to make definite and certain, as the circumstances may require.⁶

¹ Story's Eq. Pl., sec. 254; Shipman's Eq. Pl., p. 334.

² Sturgess v. Burton, 8 O. S. 215; Ferguson v. Gilbert, 16 O. S. 88; *ante* sec. 20.

³ Supervisors of Kewaunee Co. v. Decker, 30 Wis. 624.

⁴ *Ante* sec. 461.

⁵ Bank v. Railway Co., 16 W. L. B. 399; 11 W. L. B. 86. R. R. Co. v. Hedges, 41 O. S. 233, was an action

for the value of a horse killed by defendant's cars. Plaintiff counted upon two grounds, insufficient fencing of the track under a contract, and negligent running of the train. Mills v. Barney, 22 Cal. 240; Brinkman v. Hunter, 73 Mo. 172. See *ante* sec. 21.

⁶ Bliss' Pl. 290; Bolling v. McKenzie, 89 Ala. 470; Stults v. Buckelew, 28 N. J. L. 151.

Sec. 56-5. Allegations when seeking equitable relief.

—Is there any difference in the form of statement or rules of pleading between actions at law and equity? Some writers contend that as the essential difference between actions at law and in equity is still recognized, and though the distinction in the form of the action is abolished, that no new rules or principles of pleading have been formulated. We discussed this matter under the head—to what extent the code changed the common-law rules of pleading—and there reached the conclusion that the forms of pleading in *all civil actions* (this includes equity) are those prescribed by the code.¹ The facts constituting the cause of action must be stated in the same manner, whether in law or in equity. But there are some points of difference from the very nature of things. Recourse can be had in equity only where there is not an adequate remedy at law. This fact must appear in some manner upon the face of the pleading, and generally will appear incidentally from the facts alleged, without any special allegation to this effect. Where it does not so appear then there must be a special allegation of facts which will show that there is not an adequate remedy at law, or that the damage or loss is irreparable. An allegation that there is not an adequate remedy, or that the loss or damage is irreparable without stating the facts, being a conclusion, is improper.

It is said that in some cases the rule is not so exacting in equity as in law, in stating facts with particularity and definiteness where the case is of such a nature that it is difficult to ascertain and state all of the facts minutely; that greater liberality prevails towards suitors in equity when appealing to the extraordinary powers of the chancery courts. Courts granting extraordinary relief may sometimes extend a lenient hand to the pleader.

Sec. 56-6. Allegations upon information and belief.

The requirement of the code is that the facts shall be positively and definitely stated. There has been considerable controversy upon the propriety of making allegations on information and belief, and there is some confusion in the minds of practitioners, owing to the lack of definiteness in the decisions touching the question.

Facts may be within the personal knowledge of a party, while others may be learned by information from other sources, and therefore believed to be true. There can certainly be no objection to stating the facts in either case definitely if reliance can be placed upon the information.

¹ *Ante* sec. 49-1.

Both at common law and equity the practice of making an allegation upon belief was condemned.¹ But it is well known that the rules of equity pleading recognized those states of the mind as to the truth of any proposition, which reason and experience show have always prevailed.²

And so under the present practice an allegation that plaintiff "is informed and believes" that a particular fact exists is condemned.³ But allegations in a different form have been approved, as that plaintiff "is informed and verily believes and thereupon avers" the fact to be, has been considered a positive averment.⁴ This form of averment, or those similar in effect, have been upheld in a number of instances.⁵

Gholson, J., when speaking of denials upon information and belief, said: "A party is permitted to assert in his pleading those facts only which he believes to exist, or to have occurred. * * * Our code contemplates, for the sake of brevity and conciseness, a simple statement of facts, without reference to the manner a knowledge of them, or a reason to believe them, may have been obtained or may exist; and, it is probable, with this view any reference to knowledge or information was omitted."⁶ Scott, J., said: "It might be said that the party attempts to set up the facts of his information and belief * * * yet it is quite apparent * * that it is not *his belief* but the *facts believed to exist*, upon which he relies for his defense. Any pleading under the code, taken in connection with its proper verification, amounts to nothing more than a statement, under oath, of what the party pleading believes to be true. As a general rule, the proper mode is to state the facts directly and positively in the body of the pleading, and let the verification show that this statement is made as matter of belief only."⁷ That expresses the correct view. If one is reliably informed he can *believe*; then let the pleader aver the facts, whether they be within his personal knowledge or whether obtained upon the information of others, in a positive and direct manner, without showing that any of them were obtained upon information, and the verification will show that he only believes them to be true. Any complaint or objection to allegations made in this manner for lack of directness or positiveness, being matter of form must be by motion, otherwise it will be waived.⁸

¹ Uxbridge v. Staveland, 1 Ves. 56; Story's Eq. Pl., 251.

² See Treadwell v. Commissioners, 11 O. S. 183, 188.

³ Lucas v. Oliver, 26 Ala. 626.

⁴ Wells v. Bridgeport, 30 Conn. 316.

⁵ Thackara v. Reid, 1 Utah, 238;

Carpenter v. Smith, 20 Col. 39; Jones v. Mining Co., 20 Col. 417.

⁶ Treadwell v. Commissioners, 11 O. S. 183, 188.

⁷ Stoutenburg v. Lybrand, 13 O. S. 228, 234.

⁸ Stoutenburg v. Lybrand, *supra*; Treadwell v. Commissioners, *supra*.

Sec. 57. Attaching copies.—Despite the fact that a distinguished jurist and author,¹ while the code was in its infancy, placed a construction on sections 5085 and 5086 of the code, relating to attaching and pleading copies of written instruments, which has not since been made clearer by any court or writer, there is at this time considerable confusion, diversity of practice and lack of understanding as to these two provisions. An attempt, therefore, will here be made to throw such further light upon the subject as may be derived from the practice and experience of the bar, and adjudications in those states which have adopted the same provisions.

Both provisions must be kept in mind. The first and the one considered in this section is: "When the action, counterclaim or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading; and if not so attached and filed, the reason for the omission must be stated in the pleading."² The other, section 5086, treated in the next section, may be termed pleading by copy, as distinguished from section 5085. There is this distinction to be observed: Section 5085 embraces accounts and written instruments as evidence of indebtedness, while section 5086 also includes accounts, and, in addition thereto, instruments for the unconditional payment of money only. It is therefore apparent that both sections unite upon some instruments—that is, many fall within both provisions. For example, an account or promissory note will come within the purview of both provisions, as an instrument as evidence of indebtedness and for the unconditional payment of money only. But section 5085 is broader in its terms and will include all kinds of instruments, whether conditional or unconditional, when evidencing an indebtedness. Here is the point at which the confusion and diversity of practice have arisen. Section 5085 is imperative in its provision: "a copy thereof must be attached to and filed with the pleading;" while section 5086 reads: "it shall be sufficient for a party to set forth a copy of the account or instrument." This, however, was made plain by Judge Swan many years ago in the following language: "Some

¹ Swan's Pleading, pp. 192-200.

² O. Code, sec. 5085.

have supposed that the instruments named in section 122¹ must be copied into the pleading, and also a copy annexed to the same pleading, so as to comply with both of these sections of the code." He then adds: "This is manifestly a mistake. It is absurd to suppose that the code would require a copy of the instrument to be annexed and filed with a pleading, for the purpose of advising the opposite party of the written evidence of indebtedness stated in the pleading, when a copy of the same instrument is incorporated into the pleading itself."² The text quoted from Judge Swan is now fully supported by authority under similar provisions in this and other states. When a note is copied or pleaded *in hæc verba* in the petition in the manner provided in section 5086, it is a substantial and sufficient compliance with the section requiring a copy to be attached. The fact that a copy has been incorporated in the pleading furnishes the reason for the omission to attach a copy as required by the section under consideration.³ The direct question has been before the supreme court of the state of Kansas, which state has adopted the same provision.⁴ It was there held that when a note was set out in full in the body of the petition, and thereby made part of it, an omission to attach a copy was not error. While technically it may be, if it is part of the petition it is not attached to and filed with it, and therefore the provision requiring a copy to be attached is not complied with; yet as it does not affect any substantial rights it will be immaterial.⁵

The principal point of difficulty where the confusion arises, is in promiscuously attaching copies of instruments not falling within either section 5085 or 5086, being neither evidence of indebtedness nor for the unconditional payment of money only, as well as those instruments evidencing indebtedness but not for the unconditional payment of money only, at-

¹ Code, sec. 5086.

² Swan's Plead., p. 192.

³ Rouse v. Groninger, 2 W. L. M. 278; Phoenix Ins. Co. v. Stocks, 86 N. E. Rep. 408 (Ill., 1898); Benjamin v. Delahay, 2 Scanl. 574.

⁴ Kan. Code, sec. 4301 (118). Nebraska has also adopted it. Neb.

Code, secs. 124-129. That is, these two states have adopted in exact language both sections 5085 and 5086 of the Ohio code.

⁵ Budd v. Kramer, 14 Kan. 101. The original note instead of a copy may be attached. Reed v. Arnold, 10 Kan. 102.

tempting to make the same part of the pleading by reference, and to supply necessary averments by reference to copy attached. This may readily be understood when it is remembered that section 5085, embracing accounts and instruments as evidence of indebtedness, was designed as a substitute for the prayer of oyer at common law, and as a requisition on the plaintiff to give copies of such instruments in advance.¹ Upon a careful consideration of this provision the conclusion reached is, that it has in many cases been diverted from its original purpose by loose practice and partial acquiescence in the method of attaching copies other than counter-claims, or set-offs founded upon accounts, or instruments for the unconditional payment of money only, thereby attempting to supply the omission of the proper averments in the body of the petition. In fact the practice has been followed to some extent of attaching copies of instruments which do not fall within either section 5085 or 5086, as well as those falling within 5085 but not within 5086, being evidence of indebtedness, but not for the unconditional payment of money only, and making the general averments which section 5086 provides may be made when copies of instruments falling under the latter section are incorporated into the petition. This should be pronounced as wrong and in disregard of the code and adjudications thereunder. This statement is made with knowledge that such a practice has in a measure been upheld by courts, but it is supported by some earlier as well as more recent cases. The rule may be safely stated that a copy of an instrument as evidence of indebtedness which is not for the unconditional payment of money only, which may be attached to a petition under the provisions of section 5085, cannot be considered in any sense as part thereof, and that the

¹ *Memphis Med. College v. Newton*, 2 Handy, 168. See, however, Code, sec. 5293. "It was probably intended, so far as it goes, as a substitute for oyer at common law." *Swan's Pldg.*, p. 202. And in the next section Judge Swan states on page 198 of his work: "It does not make the copy annexed either a part of the record or a part of the pleading. In this respect it operates differently from the one hundred and twenty-second section of the code, relating to pleadings founded upon mere money instruments; for the latter section by its own provisions makes the copy a part of the pleading, inasmuch as the allegations in the pleading prescribed by that section are upon the copy."

allegation frequently adopted, "that a copy is hereto attached and made a part hereof," does not and cannot make such an exhibit part of a petition, and when so attached does not dispense with any of the allegations necessary to be made to constitute a cause of action.¹ The sufficiency of a petition

¹ *Memphis Med. College v. Newton*, 2 Handy, 163, which was a transcript of a judgment of a sister state. So with *Renniman v. Dean*, 2 W. L. G. 2 (Cin. Super. Ct.). In *Burch v. Young*, 2 W. L. M. 550, the Athens district court held that a copy of a note filed with the pleading formed no part of the record.

A judgment is not a written instrument within the meaning of section (117) 5085. *Cox v. Farley*, 2 W. L. M. 315. *Olney v. Watts*, 43 O. S. 500.

Copies attached to and filed with the pleading as required by section (117) 5085 form no part of it. *Larimore v. Wells*, 29 O. S. 16 (1875). In the latter case the instrument was a note, but it was neither set forth nor exhibited, as it was not in plaintiff's possession.

In *Byers v. Insurance Co.*, 35 O. S. 606, it was held that where a copy of a policy of insurance was attached, which was treated by the parties as part of the petition, a reviewing court would so treat it. See, also, *Smith v. Woodruff*, 1 Handy, 276.

In *Crawford v. Satterfield*, 27 O. S. 421, it was held not proper to either copy into or attach a copy of an instrument which is not for the unconditional payment of money only, making it a part of it.

The substance or terms of a bond should be stated in a petition in an action for its breach, and it is not sufficient to attach a copy and aver a breach generally. The character and extent of the obligation must be shown. *Sargent v. Moore*, 1 Disney, 99. It is not an instrument for the payment of money only. *Carring-*

ton v. Bayley, 43 Wis. 507; *Bentley v. Dorcas*, 11 O. S. 409; *West v. Dods-worth*, 1 Disney, 161.

An attachment bond cannot be made part of a petition. *Seattle Crockery Co. v. Haley*, 33 Pac. Rep. 650 (Wash., 1893), or a guardian's bond. *Clements v. Hughes*, 17 S. W. Rep. 285 (Ky., 1891). But see as to a *supersedeas* bond, *Walburn v. Chenaunt*, 43 Kan. 352.

In *Lynd v. Caylor*, 1 Handy, 576, it was held that a contract should not be attached. An exhibit which is referred to, not as part of petition, but as evidence of a contract, cannot be regarded on demurrer. *Nathan v. Lewis*, 1 Handy, 239.

Judge Swan in his work on Pleading states: "It is not necessary to allege in the pleading that a copy of the written instrument is annexed to the pleading. It is proper to do so, and is generally done. . . . Such an allegation does not make the copy a part of the pleading or record. It does not, therefore, supply any defects or omissions of allegation necessary to constitute a cause of action. The material parts of the instrument should be concisely stated or recited, or copied into the pleading, and not left to be gathered from the copy attached. In fine, the pleading should be the same as if the copy were not attached."

Gwynne v. Jones, 5 O. C. C. 298, holds that no instruments but those mentioned in section 5086 when attached will be looked to for the purpose of supplying the necessary averments.

Nothing further need be added to

founded upon any instrument not falling within either section 5085 or 5086, or those falling under 5085 and not under 5086, must be determined by its face, and not by any accompanying exhibit; as it forms no part of the pleading, and cannot be considered in determining its sufficiency upon demurrer.¹

On the other hand authorities may be found which do not agree with the views already expressed; as, for instance, it has been held that a telegram or other exhibit may be annexed to and made part of the petition.² And in a recent case in Nebraska, whose code provision is the same as that under consideration, it was held that an exhibit will be regarded upon demurrer as part of the pleading, if the facts therein stated, in connection with those in the petition proper, show a liability.³ Yet the court in delivering the opinion stated it to be the better practice to make a direct statement of the facts in the order in which they occur. This is the direct and orderly method which a good pleader will observe.

In conclusion the rule may be restated, that no paper should be attached to a pleading as an exhibit except an account, or a counter-claim or set-off founded upon an account, or a written instrument as evidence of indebtedness, or for the unconditional payment of money only, and that only accounts or instruments for the unconditional payment of money

show that the pleader should not confuse the two sections, and, whenever he chooses, attach a copy, and adopt the averments permitted by section 5086 as to instruments falling under that provision.

¹ *Merrill v. Central Trust Co.*, 46 Mo. App. 237; *Bayless v. Price*, 81 N. E. Rep. 88 (Ind., 1892); *Peake v. Ball*, 65 Mo. 224; *Kearn v. Insurance Co.*, 40 Mo. 19; *Curry v. Lackey*, 35 Mo. 389; *Pomeroy v. Fullerton*, 21 S. W. Rep. 19 (Mo., 1893); *Chattanooga, etc. R. Co. v. Palmer*, 89 Ga. 161. *Cf. Gwynne v. Jones*, 5 O. C. C. 298.

² *Sherill v. Telegraph Co.*, 109 N. C. 527 (1891); *Caspari v. Portland*, 19 Oreg. 496. The lower courts in New York have gone to a still greater ex-

tent, and have included instruments which do not fall within the provision of either of the sections. In *Fairbanks v. Bloomfield*, 2 Duer, 353, Judge Duer said: "The safest course, under the code, where an action is founded on an instrument in writing, is to annex a copy and refer to it as a part of the complaint." "This we hold to be good practice" says the city court of New York in *Taylor v. McLea*, 11 N. Y. S. 640. As to attaching an ordinance see *Street Ry. Co. v. Street Ry. Co.*, 6 O. C. C. 385.

³ *Pefley v. Johnson*, 30 Neb. 529; 46 N. W. Rep. 710 (1890), *Maxwell, J.* This was a case upon a contract of sale.

can, when so attached, be considered in determining the sufficiency of a pleading.

It has been held that an instrument as evidence of indebtedness under section 5085 must be such an one as will show the right to recover a sum certain, due at a time stated therein.¹ An evidence of indebtedness may include an instrument which is not for the unconditional payment of money. If that be true, then there are other instruments than those for the unconditional payment of money which may be attached as an exhibit. As, for instance, a contract may be an evidence of indebtedness, though not for the unconditional payment of money; or an insurance policy, or a bond,² may fall in the same category, unless the restriction made by the inferior court just mentioned³ be correct. In an action to recover an assessment, the ordinance authorizing the same should not be attached as an exhibit or embodied in the petition;⁴ and in a suit upon a foreign judgment the record, being matter of evidence, should not be attached,⁵ though it may be proper to attach a transcript of a foreign judgment.⁶ The question as to attaching an insurance policy to a petition, thereby attempting to dispense with the proper averments in the petition by a reference to the policy referred to and made a part thereof, was brought directly before the supreme court of Ohio, but was disposed of upon the theory that, as there was no objection to the pleadings in the lower court, it was not error in the reviewing court to treat the policy as a part of the petition, and so the vital question was not involved or decided.⁷ The sufficiency of the reason for an omission to attach a copy must be decided by the court, and does not affect the merits of the action.⁸

Sec. 58. Pleading by copy.—Some of the principles discussed in the preceding section are applicable to the provision of the code now to be considered. The code further provides: "In

¹ Woodbridge v. Brophy, 2 W. L. M. 274 (1860).

² Dougherty v. Longmore, 2 C. S. C. R. 134.

³ Woodbridge v. Brophy, *supra*.

⁴ Carney v. Kirby, 1 Disn. 479.

⁵ Judds v. Dean, 2 Disn. 210.

⁶ Dougherty v. Longmore, 2 C. S. C. R. 134.

⁷ Byers v. Insurance Co., 85 O. S. 606. To the same effect as to a note, see Andrews v. Alcorn, 13 Kans. 351.

⁸ Larimore v. Wells, 29 O. S. 13.

an action, counter-claim or set-off founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."¹ This provision abrogates the common law and in fact allows the pleading of a legal conclusion,² but with statutory sanction. It must be borne in mind, however, that this method of pleading can be adopted only where the copy shows all the necessary facts to determine the liability of the parties. And if it does not, as when others than the makers of a note or acceptors of a bill are parties, then all such extrinsic facts as will fix the liability must be alleged. This provision contemplates that a copy of any instrument such as is provided therein, may be incorporated into and made part of the petition. A party is only excused from stating all the facts in the body of the petition, or permitted to adopt this course of pleading in actions, counter-claims or set-offs founded upon an account, or upon an instrument for the unconditional payment of money.³ The practice under this provision was also outlined by Judge Swan, which may appropriately be quoted: "It is sufficient here to say that the better practice is to insert the copy in the pleading of such money instruments as are described in section 122,⁴ whenever a party states his cause of action in the manner allowed by that section; and that if it is not so inserted, but attached and referred to in the pleading as annexed, it will also be sufficient, and the court will in such case treat the annexed copy as a part of the pleading itself, under that section, inasmuch as the allegations of the pleading authorized by that section are upon the copy, whether embodied in the pleading or annexed, and the copy therefore

¹ Ohio Code, sec. 5086; Kansas Code, sec. 123; Nebraska Code, sec. 129 (4666), and New York Code, sec. 534, are all alike.

² Evans v. Crocket, 2 W. L. M. 603. See sec. 51.

³ O. Code, sec. 5086; West v. Dods-worth, 1 Disn. 161.

⁴ New Code, sec. 5086.

necessarily forms a part of the pleading by force of the section."¹ This rule will permit the pleader to adopt either method he may choose, by incorporating into his pleading an account or an instrument for the unconditional payment of money only or attach a copy; he should be governed by the nature of the case as to whether it should become in full a part of the petition.² If attached as an exhibit, and the short form of allegation adopted, the same will be considered part of the petition when construing the allegations thereof.³ And it must also be remembered that a general allegation of indebtedness can only be made when all of the facts necessary to charge the party appear on the face of the instrument. The proper method of pleading an action upon an account, note or instrument for the payment of money is to set forth a copy in the petition with all the general allegations of indebtedness when the instrument warrants it, and, as has been stated in the preceding section, the fact that a copy is incorporated into the petition dispenses with the necessity of attaching a copy of any instrument falling also within the provision of section 5085. This provision, therefore, is free from difficulty when the purpose of the previous section is made clear. When, therefore, any of the instruments included herein show upon their face the necessary facts to fix the liability, then, as before stated, a copy may be inserted and the general averments made. The instruments falling within this provision must not only be for the unconditional payment of money but must be for that only;⁴ and where it is conditional and dependent upon outside facts, a complete cause of action must be set forth.⁵ A transcript of a record showing the recovery of a judgment is not an instrument for the un-

¹ Swan's Pldg., p. 193, citing *Ohio Life Ins. Co. v. Goodwin*, 1 Handy, 31; *Memphis Med. College v. Newton*, 2 Handy, 165. Judge Swan also states in a note that the code commissioners in the forms illustrating the pleadings under section 122 have referred to the bill or note as attached to the petition.

² *Crawford v. Satterfield*, 27 O. S.

421. See *Smith v. Woodruff*, 1 Handy, 276.

³ *State v. School District*, 34 Kan. 237; *Reed v. Arnold*, 10 Kan. 103. See, also, *Andrews v. Alcorn*, 13 Kan. 351.

⁴ Swan's Pldg., p. 182.

⁵ *Conklin v. Gandall*, 1 Keyes, 231; *Tooker v. Arnoux*, 76 N. Y. 397.

conditional payment of money only;¹ nor is a bond,² or an insurance policy,³ or a mortgage,⁴ or articles of separation between husband and wife with a covenant to pay a certain sum for support.⁵ An instrument promising to pay so much per month on the first of every month for a certain length of time also falls within this provision.⁶ The method of pleading provided by this section is permissive merely, and a plaintiff may, if he so desire, state the facts in a different form.⁷

Sec. 59. Pleading conditions precedent.—It was necessary at common law that all facts which showed the performance of conditions precedent be set out, which rendered the subject difficult; hence the salutary rule of the code was adopted that in pleading the performance of conditions precedent in a contract, it should be sufficient to state that the party had duly performed all the conditions on his part; and if such allegation be controverted the party pleading must establish, on the trial, the facts showing such performance.⁸ A general allegation of the performance of conditions precedent is now sufficient;⁹ and a petition which does not aver a performance or a waiver is demurrable.¹⁰

Sec. 60. Attaching interrogatories — Discovery.—The subject of obtaining information from an adversary by means of interrogatories attached to a pleading is probably not so well understood by the younger practitioner, owing to the fact that the treatment of the subject is confined mostly to works strictly upon the old chancery practice, and because of the inclination not to look further than modern works on code pleading. The provisions of the code permit-

¹ *Memphis Med. College v. Newton*, 2 Handy, 168.

² *Bentley v. Dorcas*, 11 O. S. 409; *West v. Dodsworth*, 1 Disn. 161; *Carrington v. Bayley*, 43 Wis. 507. See *ante*, sec. 57, and *cf.*

³ *Byers v. Insurance Co.*, 35 O. S. 606.

⁴ *Peyser v. McCormack*, 7 Hun, 300; *Rose v. Meyer*, 1 How. Pr. (N. S.) 374.

⁵ *Dupre v. Rein*, 7 Abb. N. C. 286.

⁶ *Chase v. Behrman*, 10 Daly, 242.

⁷ *Collingwood v. Bank*, 15 Neb. 118.

⁸ O. Code, sec. 5091.

⁹ *Crawford v. Satterfield*, 27 O. S. 421; *Insurance Co. v. McGookey*, 33 O. S. 555; *Nathan v. Lewis*, 1 Handy, 239; *Humphreys v. Staley*, 8 W. L. M. 628. This is true only when authorized by statute. *Rhoda v. Alameda Co.*, 52 Cal. 350.

¹⁰ *Insurance Co. v. Lindsey*, 26 O. S. 348.

ting parties to annex interrogatories was undoubtedly designed to accomplish the same results as the regular equitable proceeding in discovery, as precisely the same results are accomplished as in the suit for discovery. Furthermore, to understand the method of procedure under the code, the doctrine and rules of discovery as established by courts of equity are still in force and applicable to the new procedure.¹ And whilst the old suit for discovery is now almost entirely out of use, it is still in force and part of the code. It is not adopted because a case can hardly arise in which the code interrogatory will not answer. It is an auxiliary suit or proceeding to aid in maintaining a legal right. As, for instance, where a person claiming to have a cause of action or defense to an action commenced against him is unable, without a discovery of a fact from the adverse party, to file his petition or answer, he may bring his action for discovery, setting forth in his petition the necessity therefor and the grounds thereof, and such interrogatories relating to the subject-matter of the discovery as may be necessary to procure the discovery sought.² Generally when the answer was obtained, the function of the court of equity was at an end, although it frequently retained the case and determined the whole controversy.³ As before stated, the other provision answers every purpose. A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issues made by the pleadings, which, if not demurred to, shall be plainly and fully answered under oath by the party to whom they are propounded, or, if such party is a corporation, by the president, secretary or other officer thereof, as the party propounding requires.⁴ The petition must show a good cause of action, and the interrogatories should be based on some distinct allegation.⁵ They should be confined to matters in issue, although they may cover every incident of the facts alleged; and if they go beyond the scope of the inquiry of the petition, the defendant may have their propriety tested by his answer or

¹ Chapman v. Lee, 45 O. S. 356. See Nash's Pldg., p. 117.

² O. Code, sec. 5293.

³ Chapman v. Lee, 45 O. S. 356-365.

⁴ O. Code, sec. 5099.

⁵ Grim v. Wheeler, 3 Edw. Ch. 334; Bank v. Levy, 3 Paige Ch. 606. See Work v. Haughton, 1 Disney, 156; Story's Eq. Pldg., sec. 36.

demurrer.¹ It is an old rule that the plaintiff is bound to state what the purpose of the discovery is.² A recent writer, however, states that a defendant is bound to answer even though the interrogatory is not founded on a specific allegation.³ They must be material and relevant to the issues tendered, and may be stricken out if not;⁴ and where a question is raised as to the sufficiency of the answer it must be determined by the allegations in the petition.⁵ A party is entitled to his adversary's oath only as to such material facts as relate to his own case, and cannot extend to a discovery of the manner in which the defendant's case is established, or to the evidence which relates exclusively thereto.⁶ While the complainant may be entitled to discovery whenever he is entitled to relief,⁷ yet this cannot be so where it would subject a person to a penalty or forfeiture, or would cause a breach of professional confidence, or where the interrogatories relate to irrelevant or immaterial matters,⁸ or where the interrogatories in fact amount to a cross-examination.⁹ It has been held that interrogatories may upon leave be annexed to a petition already on file.¹⁰

Sec. 61. Objections to Interrogatories.—An adversary may demur to the interrogatories¹¹ upon the grounds stated

¹ Fuller v. Knapp, 24 Fed. Rep. 100; Bank v. Levy, 3 Paige Ch. 606.

² Wigram on Discovery, pp. 148, 149; Devore v. Dinsmore, 4 W. L. M. 144; Templeton v. Morgan, 4 W. L. M. 146.

³ Beach on Mod. Eq. P., sec. 338.

⁴ Druley v. Hendricks, 18 Ind. 478; Insurance Co. v. Cannon, 48 Ind. 264; Beach's Mod. Eq. Pldg. 835, and cases cited.

⁵ Story's Eq. Pldg., sec. 86.

⁶ Downie v. Nettleton, 61 Conn. 598; Railroad Co. v. Cable Co., 88 Va. 982; Wigram on Discovery of Prop., 3, pp. 259, 269 (18 Law Library). Lord Loughborough said in Renison v. Ashley, 2 Vesey, Jr. 461, that he "did not like to see a fishing bill in court." Again in Ivy v. Kekewick, 2 Vesey, Jr. 679, he said:

"This is a fishing bill to know how a man makes out his title as heir. He is to make it out; but he has no business to tell the plaintiff how he is to make it out." See, also, Bolton v. Liverpool, 1 Myl. & K. 88. An adversary cannot be interrogated as to facts respecting his own title, but merely those with respect to the title of the plaintiff. Story's Eq. Pldg., secs. 317, 846; Cuyler v. Bogert, 3 Paige Ch. 186.

⁷ Metler v. Metler, 18 N. J. Eq. 274.

⁸ Metler v. Metler, 18 N. J. Eq. 274; Cadwallader v. Granville, etc. Society, 11 O. 292.

⁹ Morris v. Edwards, 23 Q. B. D. 287.

¹⁰ Templeton v. Morgan, 4 W. L. M. 146. See Davis v. Davis, 119 Ind. 519.

¹¹ O. Code, sec. 5079.

in the preceding section; that is, upon the ground that the answer may subject the person interrogated to penal consequences; or that it is immaterial to the purposes of the suit; or will involve a breach of some confidence; or that the matter sought to be discovered relates to the title of the person interrogated; or that in conscience the defendant's right is equal to the plaintiff's.¹ The authorities are not in harmony as to the practice in reference to the demurrer. It is held that a demurrer to the whole bill or petition includes or extends both to the relief and discovery;² and that if a general demurrer is held good to the relief but not to the discovery, it will also bar the discovery, upon the ground that, discovery being the only means for relief, if that cannot be granted then the discovery is of no avail.³ On the other hand, an eminent author states the rule to be, that where the petition is for relief, and discovery is only incidental thereto, a defendant may demur to the relief and answer as to the discovery sought;⁴ and if it cannot be maintained as to the relief it cannot be for the discovery.⁵ There can be no question as to the proposition that a demurrer may be filed to both relief and discovery, in which case it may be a special demurrer to avoid the conflict of decision, although the doctrine that a general demurrer may be filed is well supported.⁶ Objection may also be taken to interrogatories which are irrelevant by motion to strike out;⁷ and this may also be done where they are not based on any matter contained in the pleadings.⁸

¹ Beach's Mod. Eq. Pldg., sec. 236; Story's Eq. Pldg., sec. 846.

² Wigram on Discovery, p. 148.

³ Metler v. Metler, 18 N. J. Eq. 273-4. In Miller v. Ford, Saxt. 365, it was held that when a party is not entitled to relief he is not entitled to a discovery. A defendant cannot be permitted to demur to the discovery only and answer as to the relief. 1 Daniell's Ch. Pr., side page 548; Brownell v. Curtis, 10 Paige, Ch. 214. It is held in Higgenbotham v. Burnet, 5 John. Ch. 184, that where the bill is for discovery and relief the defendant should answer as to the discovery and demur to the re-

lief. A general demurrer to the whole complaint will not be upheld if the discovery and relief be good as to the discovery. Livingston v. Same, 4 John. Ch. 294.

⁴ Story's Eq. Pldg., sec. 812.

⁵ Emery v. Bidwell, 140 Mass. 271; Verner v. Railroad Co., 28 Fed. Rep. 581.

⁶ 1 Daniell's Ch. Pr., star page 547, and cases cited.

⁷ Railway Co. v. Howard, 124 Ind. 280; Stevens v. Flaunagan, 131 Ind. 122-3.

⁸ Templeton v. Morgan, 4 W. L. M. 146.

Sec. 62. Same — Answer.— A party may decline to answer any interrogatory from which he may protect himself by demurrer.¹ But in the absence of a demurrer or other objection the interrogatories must be plainly and fully answered under oath, and may be enforced by nonsuit or judgment by default as justice may require.² But a nonsuit cannot be entered for failure to answer as fully as the interrogator thinks he ought to do.³ An order may be made that interrogatories attached to a pleading be answered by a certain day or stand dismissed. But it must be actually dismissed at the time fixed.⁴

Sec. 63. Motion to strike out interrogatories.—

The defendant moves the court to strike out the following interrogatories of the plaintiff attached to his petition filed herein, for the reason that the same are irrelevant and not pertinent to the matters in issue, to wit: [*State interrogatories.*]

NOTE.— See *ante*, sec. 61: *Railway Co. v. Howard*, 124 Ind. 280; *Stevens v. Flannigan*, 181 Ind. 122-3.

Sec. 64. Substitution of copies for lost papers.— When a pleading or other paper pertaining to the files in a case is lost or destroyed or is withheld, the court may, upon application of any party to the action, order a copy or substantial copy thereof to be substituted.⁵ A court cannot hear a cause⁶ nor render a judgment without pleadings being on file, either original or substituted copies.⁷ It is not necessary to give any notice to the opposite party of the substitution of lost pleadings.⁸

Sec. 65. Motion to substitute lost papers.—

The plaintiff [*or*, defendant] now comes and moves the court for leave to substitute a petition (or other papers) for

¹ *Fuller v. Knapp*, 24 Fed. Rep. 100.

² O. Code, sec. 5101; *Newburg Pet. Co. v. Weare*, 44 O. S. 610; *Chapman v. Lee*, 45 O. S. 366; *Devore v. Dinsmore*, 4 W. L. M. 144; *Longstreth, etc. Mfg. Co. v. Halsey*, 4 O. C. C. 807.

³ *Longstreth, etc. Mfg. Co. v. Halsey*, *supra*.

⁴ *Railway Co. v. Construction Co.*

49 O. S. 681. As to when the interrogatories must be answered, see O. Code, sec. 5100.

⁵ O. Code, sec. 5084.

⁶ *Mason v. Embree*, 5 O. 278. But see *Hallam v. Jacks*, 11 O. S. 692; *Wilkinson v. Daniel*, W. 363.

⁷ *Grimison v. Russell*, 11 Neb. 469.

⁸ *Marks v. Harris*, 12 W. L. B. 134.

the original petition herein, which has been lost or destroyed without plaintiff's neglect.¹

Sec. 65-1. Facts showing privity must be alleged.—Privity is a term used in pleading to express the relation and situation between parties to an action. The rule requiring that a relation of privity should exist between the parties to an action was a common-law rule, one absolutely essential under that system. It is believed that the rules of privity have been relaxed to some extent in equity. Mr. Bliss, without citing authority, says that the common-law notion that there must be some direct relation between parties to an action or contract "is a notion disregarded by the equity courts when there has been a real wrong, when a substantial right should be vindicated, and we have so conformed to equity rules, we so often give relief when there is no privity, that the rule being discussed can hardly be called a subsisting one."² Equity courts may give relief when there may not be a real privity, and the practice of the code has so conformed to equity rules that relief is often given when there is no privity.³ For the ordinary cases the general rules of privity governing the same are simple. There are two kinds of privity, 1. Of blood, and, 2. Of contract. Privity may exist: 1. Where the parties are the immediate contracting parties. 2. Where, by blood, they succeed to the original parties as heir. 3. Where there is privity by representation, as executor, administrator, guardian, etc. 4. Privies in estate, as donor, donee, lessor and lessee. 5. From assignment of contract, as assignee. 6. Where contract is made for the benefit of another. 7. Privity growing out of the domestic relations. 8. Where a contract will be implied from the conduct of parties, or, 9. Where a contractual obligation will be imposed by law because of unconscionable conduct of parties. Cases where equity will grant relief to vindicate a substantial right may not come within any of the foregoing classes, and can hardly be classified. The equity rule incorporated in the code allowing the real party in interest to maintain an action extends the rule of privity. Thus, where one person, upon a sufficient consideration, makes a promise to another for the benefit of a third person, such third person may sustain an action upon the promise.⁴

¹ Code, sec. 5084.

² Bliss Pl., sec. 234a.

³ "The privity necessary to exist between parties to proceedings in equity is not necessarily a privity of contract, but such as gives the com-

plainant a title to sue the defendant." *Busby v. Littlefield*, 31 N. H. 193.

⁴ *Thompson v. Thompson*, 4 O. S. 333; *Crumbaugh v. Kugler*, 3 O. S. 549; *Emmet v. Brophy*, 42 O. S. 82.

There is no difficulty in determining whether a relation exists between parties coming within the foregoing classes. There is no relation of privity in cases of tort or negligence; that is, it has never been so designated. There are, however, certain actions of tort which survive under the statute, as injuries to the person and property, or for deceit or fraud,¹ which would allow persons standing in the relation of privity by blood or representation to maintain suit. But where the action is brought by the immediate parties it is not characterized by this term.² But out of this tortious relation an implied contract may arise upon which the action may be based, when privity may then be said to exist. The tort may be waived and action brought upon the implied contract.

"It is not doubted that, as a general proposition, there can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining."³ The holder of a check does not stand in a relation of privity to the bank upon which it is drawn, so as to enable him to sue the bank, for the refusal of the bank to honor the check, even though the latter has funds on deposit belonging to the drawer of the check.⁴

Sec. 65-2. Anticipating defense.—A rule prevailed in equity pleading that the plaintiff, anticipating what the defense would be, could plead matter in avoidance thereof. For example, in a bill for specific performance of an oral contract the complainant could state facts taking it out of the statute of frauds. It was necessary for the defendant in such case to deny the anticipatory avoidance in order to take advantage of the statute.⁵ It has been considered by some authority that the substantial right secured by the equity practice is preserved by the code, and that the plaintiff has a right to anticipate a defense and allege facts in avoidance thereof.⁶ But this view has not been accepted to any extent, and there is no doubt that the proper practice is contrary to the equity rule, that defenses shall not be anticipated and avoided. This is more logical and convenient.⁷ The defenses of the statute of frauds and of limitations are conspicuous illustrations. It is considered that it is unnecessary for plaintiff to allege facts which render a contract valid under the statute of

¹ R. S., sec. 4975.

² Bliss Pl., sec. 240.

³ Railroad v. Bank, 54 O. S. 60, 68.

⁴ Id.

⁵ Kane v. Bloodgood, 7 Johns., ch. 90, 132.

⁶ Abbott's Trial Brief on Pldgs., 467; note in 25 Abb. N. C. 120; Bracket v. Wilkinson, 13 How. Pr. 102; Hopkins v. Ward, 67 Barb. 452.

⁷ Insurance Co. v. Meeker, 85 N. Y. 614; Claflin v. Tausig, 7 Hun, 223.

frauds, as the statute is a defense which is waived unless the defendant pleads it.¹ It is not necessary for the plaintiff to allege that an instrument falling within the statute of frauds is in writing, because the law presumes this.²

The statute of limitations is likewise regarded as a defense which must be set up by the defendant making it unnecessary for the plaintiff to anticipate and avoid. Hence the plaintiff has a right by reply to plead new matter by way of avoidance.³

But it is quite different where the facts alleged in the petition suggest or raise an inference that the instrument is invalid under the statute of frauds, or that the claim is barred by the statute of limitations, in which case it is incumbent upon plaintiff to allege facts in avoidance, otherwise his petition would be subject to demurrer.⁴ It has been held that the defendant may take advantage of the statute of frauds under a general denial.⁵ Under such a rule the plaintiff certainly has the right to sustain his cause of action by proof of collateral facts, and this has been so held.⁶ This does not seem to be a very logical course of action, and where the defendant chooses to file a general denial it would appear safer and better for plaintiff to amend and anticipate and avoid the defense. It is not believed to be an entirely improper practice, that is, the rule that defenses shall not be anticipated is not iron-clad. In the opinion of the writer it would be a wise course generally to state the facts which make an instrument valid, notwithstanding the statute of frauds, as that statute, unlike the statute of limitations, affects more than the remedy; it goes to the validity of the instrument.

In an action for the recovery of real property the defendant may under a denial claim advantage of the statute of limitations, as that affects the title of plaintiff, but the averment of legal title in the petition is sufficient without special reference to the statute of limitations.⁷

In all other actions it is not necessary for plaintiff to allege collateral facts taking the case out of the statute, unless it appears upon the face of the petition to be barred, as it is regarded as matter of defense to be raised by answer. But if it appears upon the face of the petition that the claim is barred, demurrer will lie,⁸ and if there are collateral facts relieving the bar of the statute, those facts should be alleged.⁹

¹ Gardner v. Armstrong, 31 Mo. 535; Bliss Plg. secs. 204, 353.

² Stephen's Pldg., 379.

³ Lindsay v. Maxwell, 7 Oh. Dec. 273.

⁴ Howard v. Brower, 37 O. S. 402.

⁵ Birchell v. Neastor, 36 O. S. 331.

⁶ Brock v. Knower, 37 Hun, 609.

⁷ See p. 1092, *post*.

⁸ See sec. 1150, *post*.

⁹ See sec. 1148.

Contributory negligence on the part of the plaintiff in an action by a servant against his master, or in cases where the facts alleged raise an inference that plaintiff himself was guilty of contributory negligence, must be negatived.¹ In such cases facts showing want of contributory negligence are essential to plaintiff's cause of action, and it is not then anticipating a defense. In all other cases contributory negligence is a defense which need not be anticipated nor negatived.

Sec. 65-3. Form of action—Legal or equitable—How determined.—The determination of the nature or kind of an action sometimes furnishes a fruitful field for discussion. Even with the guide furnished by positive provisions of the code there are still cases of doubt arising. The rules to be followed in the matter are here given. First: All issues of fact arising in actions for the recovery of money only, or specific real or personal property are tried to a jury.² All other issues of fact shall be tried by the court.³ These are the familiar guides of the code, and do not change the character of the actions or their method of trial from what it was at common law. According to the latter system all actions at law were triable by jury, and all equitable suits by the court. The first provision of the code embraces all of the common-law actions. Actions for the recovery of money only, include the common-law actions of *Assumpsit*, Covenant, Debt, Trespass, Trover and Case. Actions for the recovery of specific real property embraces ejectment. Actions for the recovery of specific personal property embraces detinue and replevin. These are all of the common-law actions and all the remainder are suits in equity. Now, every action, be it for the recovery of money only, or of specific real or personal property, is in substance one of the common-law actions.⁴

There ought to be no difficulty in determining the character of an action where only one kind of relief is asked, but there is some trouble where the facts entitle the party to two kinds of relief. Our courts are, however, frequently called upon to decide whether a case is for a jury or court, appealable or to be taken up on error. The form or character of the action is solved by the nature and character of relief to which the party is entitled upon

¹ See sec. 915, *post*.

² Code, sec. 5130.

³ Code, sec. 5131.

⁴ It must be remembered, however, that as the Constitution does not

prohibit the extension of the right of trial by jury, the code must be looked to for the purpose of ascertaining whether the right exists. *Gunsaullus v. Petit*, 46 O. S. 28.

the facts stated.¹ And this is not determined by the prayer, but upon the facts or case made in the petition.² It is a familiar doctrine that the formal demand or relief is not decisive of the legal or equitable character of an action, and that the same will be disregarded where the facts stated do not entitle the party to the relief asked.³ The prayer may be looked to only in one instance to decide the character of the action. Where the petition pleads an ambiguous state of facts, which may support equally an action at law or in equity, then there is no means of determining which must prevail, except by reference to the relief demanded, then the prayer will be looked to to solve the doubt and determine the character of the action.⁴ In cases where two kinds of relief for a single cause of action, and in some instances where two causes of action, one legal and the other equitable, are joined in one complaint, the rule is that whatever is the paramount or principal relief determines the character of the action, the other relief asked being regarded as incidental, to be granted only in the event that it be found that the party is entitled to the paramount relief.⁵ These are the general principles fully covering the whole matter. Illustrations of their application are not given but are found in the cases.

Sec. 65-4. Title, when and how alleged.—The plaintiff can not invoke the jurisdiction of a court for an injury to a property right—real or personal—unless he can show title, ownership or an interest in the subject-matter of the action. The title or ownership may be legal or equitable. Strictly, a bare allegation of ownership or title in the complaint is a conclusion of law, and according to the earlier equity practice this was not allowed, but the facts had to be alleged.⁶ It is now regarded both in law and equity that ownership is a fact, and that it is unnecessary to allege the facts which show how it exists; that a general allegation is sufficient.⁷

¹ *Gunsaulius v. Petit*, 46 O. S. 27; *Alsdorf v. Reed*, 45 O. S. 656; *Chapman v. Lee*, 45 O. S. 356; *Black v. Boyd*, 50 O. S. 46; *Raymond v. Ry. Co.*, 57 O. S. 271.

² *Reed v. Reed*, 25 O. S. 422; *Corry v. Gaynor*, 21 O. S. 277.

³ *Bell v. Merrifield*, 109 N. Y. 202; *O'Brien v. Fitzgerald*, 143 N. Y. 377.

⁴ *O'Brien v. Fitzgerald*, *supra*.

⁵ *Alsdorf v. Reed*, 45 O. S. 656, and

cases cited; *Rowland v. Entrekin*, 27 O. S. 47; *Ellsworth v. Holcomb*, 28 O. S. 66; *Converse v. Hawkins*, 31 O. S. 209.

⁶ *Heard Eq. Pl.*, 26; *Drew Eq. Pl.*, 10.

⁷ *Swan's Pl.*, 156; *Hume v. Watt*, 5 Kan. 140; *Commissioners v. Young*, 18 Kan. 444; *Malcolm v. O'Reiley*, 89 N. Y. 156.

Sec. 65-5. The same—Title in real actions—Recovery of possession.—Actions concerning real estate may be to recover its possession, or for trespass, to quiet title, or for the enforcement of some equitable right. In actions to recover the possession of real estate, plaintiff must have a legal title to support his action, and hence he must aver—in the language of the statute if he chooses—that he has a legal estate in the premises described. It is not essential that he follow the exact language of the code, but any apt language in compliance with the code will answer. The title may be alleged in general terms. This matter is more fully discussed in the special chapter on Real Actions, to which reference is made.¹

Sec. 65-6. The same—To quiet title.—In an action to quiet the title to real estate the petition of complainant should disclose his interest or title in the land, as that is the principal matter of controversy. That may be of two kinds; it may be a possessory interest only, or it may be an absolute ownership by legal title. "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest, or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein adverse to him, for the purpose of determining the interests of the parties therein."² It was necessary as the statute formerly read that the party be in possession, either by himself or tenant, to maintain the action; that would have deprived a reversioner or remainderman of the right to bring the action, hence the amendment. Formerly both legal title and possession were necessary; a vendee under possession by a title bond could not maintain the suit as his possession was the possession of the vendor.³

When the code was adopted a change was made, apparently following the principle in the law of real property that "if one be in possession of land under color of title, anyone claiming adversely to him must prove a better title in order to justify disturbing him in his possession."⁴ Possession, therefore, was made the sole test of the action; but it

¹ Sec. 1046, *post*.

² O. Code, sec. 5779.

³ *Thomas v. White*, 2 O. S. 540; *Douglas v. Scott*, 5 O. 194, under act of March 14, 1831, providing that

"any person having legal title and possession of lands" could maintain the action.

⁴ 1 Washburn on Real Property, 35.

was not necessary that the adverse claim relate to or affect the right of present possession.¹ The amended statute changed this rule, so that possession is not now always necessary, but this by the terms of the statute only applies to a reversioner or remainderman. Therefore in all actions other than by remaindermen or reversioners, "naked possession of real estate is sufficient to enable a plaintiff to maintain an action to quiet title, and that unless a better title be shown by defendant, the plaintiff will be entitled to a decree," and an averment of title is not necessary; merely an allegation of possession in such cases, in the language of the statute, will be sufficient.²

The result of this rule will be this. Plaintiff will allege possession merely. The defendant will then set up his title, and the plaintiff will reply, making such denials and allegations of his own title as may be necessary to make a complete answer or defense to the claims of the defendant. The answer of the defendant in such cases must make a plain denial of the possession of the plaintiff, not by argument or inference.³ A general denial, alone, would hardly be sufficient, possibly, where the plaintiff only alleges possession; it would, however, if plaintiff allege both title and possession.

Sec. 65-7. The same—Trespass to realty.—Trespass upon real property affects the possession thereof. It may affect merely the temporary possession or the permanent possession. A tenant may maintain an action for injury to the temporary possession, but not for the permanent injury, as an action for the latter can only be brought by the owner of the fee. One who does not have either possession or ownership can not maintain an action for trespass.⁴ If the action is instituted by the owner of the fee, he should allege ownership; if by the tenant in possession, he should allege the facts showing his possession and right to possession.⁵

Sec. 65-8. The same—Title in actions concerning personal property.—At common law in actions for an injury to personal property ownership was averred by the expression "of the plaintiff."⁶ This might now be considered sufficient but is not commendable. A specific allegation that the plaintiff is the owner of the goods ought to be made whether the action be for

¹ *Rhea v. Dick*, 34 O. S. 420; 19 O. S. 468, 471; 3 W. L. M. 593.

² *Watterson v. Ury*, 5 O. C. C. 347, 354. Affirmed by Supreme Court, on opinion below, 32 W. L. B. 420; *Lusby v. Jones*, 81 W. L. B. 70 (*Saylor, J.*). See *Boone's Pl.*, sec. 186.

³ *Boone's Pl.*, sec. 187.

⁴ *Williams v. Shade*, 13 Ill. App. 337.

⁵ See *Boone's Pl.*, sec. 207, note 2; 72 N. Y. 170; 48 Mo. 318.

⁶ *Bliss Pl.*, sec. 230.

trespass or for replevin, although it has been held that in the latter action an averment that: "Plaintiff is entitled to the immediate possession" is equivalent to an allegation of ownership.¹

Sec. 65-9. The same—Title or ownership of negotiable instruments.—To enable one to bring suit upon negotiable paper he must be the legal owner or holder thereof, and that fact must necessarily appear in his pleading. If it be the payee of a note, or the drawee of a bill of exchange, that fact will appear from the face thereof; if it be the holder or indorsee, that fact will appear from a copy of the indorsement. Hence, where the short form under the code is adopted, the title or ownership will appear from the copy of the note or bill incorporated into or attached to the pleading, and it is not necessary to make a more specific allegation of title. If title or ownership does not so appear from the face of the bill or note, then extrinsic facts showing title should be alleged.

Sec. 65-10. Consideration, when and how averred—The common law.—The common-law rule was that it was necessary in all cases, excepting contracts under seal, bills of exchange and promissory notes, to allege that the contract was founded upon a sufficient consideration.² All contracts under seal, bills of exchange and notes, imported consideration, and hence it was not necessary to allege what was presumed. This statement excludes simple contracts not under seal. It was necessary in an action on such a contract to allege a consideration for the promise.³

Sec. 65-11. Consideration—Rule under the code.—There is no material change under the code from the common law. The same class of contracts that imported consideration at common law are considered in the same light under the code. Though we no longer have sealed contracts, what were formerly sealed instruments now import consideration. Promissory notes and bills of exchange import consideration, and it is not necessary in actions thereon to allege and prove consideration in the first in-

¹ See *post*, sec. 1079.

² Chitty's Plg., 300; Ship. Com. L. Pl., 207; Swan's Pl., 212. (A promise alleged at common law did not, *prima facie*, import a consideration. On the contrary, it was presumed that a people proverbially sharp at a bargain always entered into an unsealed contract not negotiable, without any consideration. To satisfy this very absurd presumption

it was necessary, under the rules of pleading at common law, to state the consideration and the whole consideration of every contract not under seal and not negotiable, and if incorrectly stated, the variance on exception to the evidence was fatal.)

³ Moore v. Waddle, 34 Cal. 145; Joseph v. Holt, 37 Cal. 253.

stance.¹ Consideration being presumed also from endorsement and delivery, an endorsee does not have to allege consideration.² The rules governing pleading consideration in bills and notes are considered further in a separate chapter.³

In actions upon contracts which were formerly required to be under seal, such as deeds, contracts concerning land, or a bond given under statute, or a common-law bond, the law presumes consideration, and it is not necessary to allege it.⁴ In actions upon contracts which were formerly not under seal which were known as simple contracts, unless the statute provides otherwise, consideration should be averred and proved.⁵ In some states statutes have been passed providing that a written instrument is presumptive evidence of consideration.⁶ So we would conclude that, in the absence of a statute putting what were formerly unsealed instruments on the same footing with sealed instruments with respect to consideration, consideration should in such cases be averred. This would embrace verbal contracts and many written contracts.⁷

Sec. 65-12. Damages — How alleged. — There are two kinds of damages, general and special. General damages are such as are the legal and natural consequences of an act complained of. Special damages do not flow naturally from the wrong, but result from special causes connected with or growing out of the act complained of. Every one is presumed to anticipate the natural consequences of his wrongful act, and is liable therefor. Therefore, when general damages are sought, only a general allegation of damages need be made, and the plaintiff may give in evidence any facts showing damage that naturally and necessarily results from the act complained of.⁸ If, however, consequences result from an act not necessarily flowing therefrom, the law does not imply damages, hence they are special damages and should be alleged in order to recover therefor.⁹ For example, counsel fees in certain actions of tort involving the ingredients of fraud, malice or insult are in their nature consequential rather than special, and fall within the rule that they

¹ See sec. 297, *post*; Underhill v. Phillips, 10 Hun, 591; Fisher v. Id. 113 Ind. 474.

² Dumont v. Williamson, 18 O. S. 515.

³ Sec. 297, *post*.

⁴ See secs. 433, 453, *post*; Abbott's Brief on Pl., sec. 173, and cases.

⁵ Abbott's Brief on Pls., sec. 173, and cases.

⁶ Cal. Code, sec. 1614; Iowa Code, sec. 2112-14; Ky. Sts., p. 249; Kans. Gen. Sts., p. 183, sec. 7 (1868).

⁷ See 4 Enc. of Pl. and Pr., p. 928, where numerous cases are collected.

⁸ Stevenson v. Morris, 37 O. S. 10; Smith v. The Sloss M. Lime Co., 57 O. S. 518.

⁹ Stevenson v. Morris, 37 O. S. 10.

are recoverable without being specially pleaded.¹ In an action for assault and battery, or in fact any personal injury, if it appears that the act complained of resulted in permanent injury, damages therefor may be recovered therefor, whether it be so alleged or not.² In an action to recover for the breach of a contract to deliver stone, the difference between the contract price and the market price at the time and place of delivery required by the contract may be recovered without averment of special injury resulting from the breach, as such damages are general in their nature.³

A physician's bill in personal injury cases comes within special damage, and must be alleged to warrant recovery.⁴ These are some illustrations of the application of the rule, but what damages are the natural result of the act complained of and what are not must depend upon the peculiar circumstances of each case, and there ought to be no difficulty in applying the general rules.

In other cases the damages sustained may be of the essence or gist of the action, in which event they must be specially alleged. As, for example, in libel or slander, where the words complained of are not actionable *per se*, damages must then be alleged.

Sec. 65-13. Contracts required by statute of frauds to be in writing—The form of allegation in such case.—There are certain contracts concerning land, and to answer for the debt default or miscarriage of another, which are required by law to be in writing. They are voidable unless they are in writing. In actions upon such contracts it has always been the rule, before as well as since the code, that the plaintiff is not required in his petition to aver that the promise or contract is in writing, even if such be the fact. The reason given for this rule is, that the statute of frauds merely introduces a new rule of evidence, and does not alter or affect the rules of pleading.⁵ Another reason is that the law presumes that such contracts have been properly ex-

¹Stevenson v. Morris, *supra*; Roberts v. Mason, 10 O. S. 277; Finney v. Smith, 31 O. S. 529; Fairbanks v. Witter, 18 Wis. 287.

²Stevenson v. Morris, 37 O. S. 10.

³Smith v. The S. M. L. Co., 57 O. S. 518.

⁴Railway Co. v. Zepperlein, 1 O. C. C. 36; Klein v. Thompson, 19 O. S. 569.

⁵Whitehead v. Burgess, 38 Atl. Rep. 802 (N. J., 1897). (Van Syckel, J., said: "As long ago as the time of Lord Holt that was declared to be the rule. 2 Salk. 519. The rule is stated in the same way in the note to Duppe v. Mayo, 1 Saund. 276, and has been accepted as the cor-

rect rule ever since the time of Saunders. Elting v. Vanderlyn, 4 Johns. 237; Gould Pl., p. 191. The declaration, in this respect, is not faulty. It alleges a promise which at common law would be good by parol, and whether it was made in such form that it is good under the statute of frauds is a question which will arise on the trial.") Matson v. Sweet, 66 N. Y. 206; McCan v. Pen-
nie, 100 Cal. 547; Taylor v. Patterson, 5 Ore. 121. Price v. Weaver, 13 Gray, 273 (to the effect that the statute has not altered rules of pleading); Mullaly v. Holden, 123 Mass. 583.

ecuted in writing, and hence valid.¹ These rules prevail generally under the codes unless specially abrogated.² Mr. Bliss³ suggests that: "It might be supposed that the obligation to state the facts that constitute the cause of action would have changed this rule so as to require a plaintiff to set forth a valid contract"; that "the statute, instead of affecting the statement of the facts constituting the cause of action, although an additional fact was rendered necessary, only required the party to show, upon the trial, that he complied with it."

And the courts have held that unless the contract is denied in the answer, or alleged to be void because not in writing, the statute furnishes no defense.⁴ The thoughts suggested by Judge Bliss above quoted would naturally come to the mind upon reading the statute; that is, that it required a party to allege that a contract required by the statute to be in writing was in writing. And Judge Maxwell evidently had the same thought in mind when he said: "Nothing is gained, however, by the omission (of the allegation that it is in writing), and, ordinarily, it is better for a party to state the facts as they are, and, if the contract is not in writing, state other facts, such as possession under the contract, that will take the case out of the statute of frauds."⁵ It would seem to be just as well, and better, where the contract is in writing to so allege; if not, and there are facts which would take it out of the statute, then I would deem it better to allow the defendant to make the attack—not to anticipate it—and set forth the facts taking it out of the statute, in the reply. The plaintiff will be in a better position in such case.

But if the contract is not in writing, and it ought to be, then what? Must plaintiff refrain from bringing the suit at all; that is, is the fact that it is in writing one that he must allege and prove in any event in order to maintain his cause of action, without regard to what the defendant says or does? At the outset of this inquiry we are confronted with a holding which must be explained. It is held that where an agreement sued on is within the statute, and it is fairly to be inferred from the petition that it is not in writing, the defense of the statute is available on demurrer.⁶ If a demurrer will lie because there is a fair inference from what is stated that the contract was not in writing, is that an indication that the *fact* that an instrument is in writing is essential to the cause of action?

¹ Marston v. Sweet, 66 N. Y. 206.

² Maxwell Code Pl., 299.

³ Code Pl., sec. 312.

⁴ Marston v. Sweet, 66 N. Y. 206.

⁵ Maxwell Code Pl., 299.

⁶ Howard v. Brower, 37 O. S. 402; Randall v. Howard, 2 Black. U. S. 585.

The answer to these self-proposed interrogatories must be found in the construction of the statute of frauds. It is true that it says that no action shall be brought whereby to charge the defendant upon any such contracts, unless the same are in writing, etc.¹ But the statute does not make such contracts absolutely void. It only withholds a right of action upon them, simply making them voidable at the will of either party. The parties can not be compelled to ignore the considerations of equity, of good faith, and of moral obligation which may arise from such contracts, and to avoid them by pleading the statute of frauds.²

The statute of frauds, therefore, from the foregoing considerations, must be treated in the same manner as is the statute of limitations³—as affecting the remedy—and it may be waived by the defendant.⁴ The only objection to this theory is, that by holding that a demurrer will lie when it appears from the face of the petition that the contract is not in writing, the fact that it is in writing, in such case then becomes one of the facts constituting the cause of action, which must be alleged. The authorities hold to this effect, and therefore do not seem to be consistent with the

¹ O. R. S., sec. 4199.

² *Lefferson v. Dallas*, 20 O. S. 68, 74; *Minns v. Morse*, 15 O. 568; 5 J. J. Marsh. 380; 6 Dana 194. The case of *Ferrell v. Maxwell*, 28 O. S. 383, is misleading. It is stated in the syllabus that the contract in question being a promise to answer the debt of another, if not in writing, is void under the statute, and would seem to conflict with *Lefferson v. Dallas*, *supra*. The sole question was whether the promise in controversy was within the statute; and it was decided that it was not. "A verbal contract for the sale of land is not absolutely void, but voidable only at the election of either party." *Maxwell Pl.*, 442, citing *Lefferson v. Dallas*, *supra*; *Cahill v. Bigelow*, 18 Pick. 369; *Cresswell v. McCaig*, 11 Neb. 227. "The statute does not make the contract void in the sense that an unlawful contract is void, but simply makes it unenforceable." *Maxwell Pl.*, 442; *Brown's Stat. of*

Frauds, sec. 344. "By implication it admits that as between the parties the penal contract may give rise to equities as binding upon the conscience as if the same were evidenced by writing. It was created as a rule which public policy required. It was in this view that the courts of equity, instead of holding such contracts absolutely void, have sometimes sustained and enforced them in cases where the contract has been admitted in the answer, and the defense arising from the statute waived by a neglect to rely upon it." *Minns v. Moore*, 15 O. 571; *Wood v. Dille*, 11 O. 455; 8 N. H. 9; 3 Ves. Jr. 39n.

³ *Vore v. Woodford*, 29 O. S. 245. Sec. 65-17 *post*.

⁴ It is a defense and is waived unless pleaded, *Maybee v. Moore*, 90 Mo. 340; *McClure v. Otrich*, 118 Ill. 320, or the evidence is objected to. *Nunez v. Morgan*, 77 Cal. 427; *Marston v. Swett*, 66 N. Y. 206.

other holdings that the statute is merely a defense. A demurrer only questions the sufficiency of the law upon the facts alleged. And while the petition may show the claim to be within the statute, the fact that the defendant intends to rely upon the statute as a defense, ought to be brought upon the record by him by a pleading of fact—by answer. When he files a demurrer, he simply orally informs the court that he intends to rely upon the statute. It is true he may state specially in his demurrer that the claim is barred, but there is no authority for that; he can properly only say that there are not facts stated sufficient to constitute a cause of action.

In conclusion it may be stated upon this subject:

1. The plaintiff need not allege that a contract clearly falling within the terms of the statute is in writing, as the law presumes that it has been properly and legally executed.

Unless—2. It appears from the facts stated in the petition that it is not in writing, in which case plaintiff must allege facts which will take it out of the operation of the statute, as that there has been part performance.

Sec. 65-14. The same—Statute of Frauds, how taken advantage of.—Advantage of the statute may be taken by the defendant upon demurrer if it fairly appears from the facts stated in the petition,¹ but if it does not so appear, a demurrer will not lie merely because the plaintiff has not alleged that the contract was in writing, that is, simply on account of the absence of that fact, as it has heretofore been stated,² this is not a fact to be alleged by the plaintiff in the first instance.

Upon what principle or theory the courts have decided that a demurrer will raise the plea of the Statute of Frauds, or of limitations, has not been explained by any court or author, so far as the writer has been able to discover. It is a question that naturally arises, but does not seem to have been specially explained.

There are eight grounds of demurrer, and the only one under which this might come is that the petition does not state facts sufficient to constitute a cause of action.

¹ Howard v. Brower, 37 O. S. 402; Arguello v. Edinger, 10 Cal. 150; Shank v. Teeple, 33 Ia. 189. Okey, J., in Chapin v. Longworth, 31 O. S. 421, said: "And we need not determine whether under the code

system of pleading the defense of the statute is available on demurrer to a petition—a question upon which the authorities are in conflict."

² *Ante* sec. 65-13.

As already stated, demurrer will not lie merely because the petition has not alleged that the contract was *in writing*, as that is not one of the facts which it is necessary to state; it is no part of the cause of action.

But we have seen that if the contract was one within the statute, and it fairly appears that it was not in writing, the defense of the statute is available on demurrer.¹ The court arrives at this conclusion without stating its reasons.

It would seem that the only reason that can be given for holding that a demurrer will raise the question that the petition is defective because it does not state the fact that the contract is in writing, or facts which take it out of the operation of the statute, is, that there are not sufficient facts stated to constitute a cause of action. And this is not consistent with the theory advanced in the preceding section as to the nature of the statute, nor with the decisions declaring that contracts within the statute, which are not executed in conformity thereto, are not void but voidable.²

The reason, therefore, for sustaining a demurrer to a petition under such circumstances is the same as in the case of the statute of limitations,³ that sufficient facts are not stated to constitute a legal cause of action.

The fact that the contract is not executed in conformity to the statute appearing upon the face of the petition, the defendant does not then have to bring it forward as a new fact, but may either, as we shall directly see, object to the evidence under a denial, or say *upon argument* upon demurrer that he desires to take advantage of it, and hence there are not sufficient facts stated.

It does not seem to be exactly consistent with logic to say that a demurrer will lie, even when the fact that the contract

¹ Howard v. Brower, 37 O. S. 402.

² The cases in Ohio, holding that such contracts are not void but voidable, are Lefferson v. Dallas, 20 O. S. 68, decided in 1870, and Minns v. Morse, 15 O. S. 569, decided in 1846, and are well considered cases, in harmony with the view taken of the statute in very early England, and I believe the correct conclusion, universally sanctioned.

³ Combs v. Watson, 32 O. S. 228,

where it is said that when the facts taking the matter out of the statute are not stated, demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action will lie. See Douglas v. Corry, 46 O. S. 349. In Seymour v. Ry. Co., 44 O. S. 12, it is said where the petition on its face shows the action to be barred, no legal cause of action is stated; that sufficient facts are not stated.

is not duly executed appears in the petition, as the fact that the defendant desires to rely upon the statute is a fact which he ought to bring forward in his pleading, or else he ought to take advantage of the statute when it comes to the introduction of testimony. Sustaining a demurrer to such a petition is tantamount to saying that the plaintiff must allege facts relieving the contract from the operation of the statute.

This has been explained at the close of the last section.

Sec. 65-15. The same—Statute of Frauds as a defense.

—If contracts not executed in conformity to the Statute of Frauds are only voidable,¹ then the *fact* that it is not so executed, the defendant may bring upon the record as new matter constituting a defense. There is authority for this view.²

And it has also been held that a defendant may raise the plea of the statute under a general denial. In such case the plaintiff must prove his contract, the general denial raising the issue as to the making thereof, and the statute affecting procedure so far as concerns the evidence, in which event the defendant may object to the competency of the evidence to prove a contract required to be in writing.³

Sec. 65-16. The same—The plea of the statute how alleged.—The rule that a promise required by the statute to be in writing may be declared on generally without an averment that it is in writing, does not apply to a plea by the defendant setting forth an agreement in bar of plaintiff's claim. So where a defense to an action is founded on an agreement within a statute, the answer must show that it was in writing.⁴

Sec. 65-17. Statute of limitations—Its nature as a defense.—The nature of the defense of the statute of limitations and to what cases it is applicable is considered to some extent elsewhere.⁵ But some further observations will be made here.

There is nothing better settled than that the statute of limitations is a defense, a right or privilege conferred upon one, which may or may not be exercised. It is a right, too, which may be

¹ *Ante* sec. 65-13, note 2, p. 157.

² *Gardner v. Armstrong*, 31 Mo. 535; *Osborne v. Endicott*, 6 Cal. 149; *Sherwood v. Saxton*, 63 Mo. 78; *McClure v. Otrich*, 118 Ill. 320; *Martin v. Blanchett*, 77 Ala. 288.

³ *Birchell v. Neaster*, 36 O. S. 331; *Allen v. Richard*, 83 Mo. 55. "The defendant is allowed, of course, to deny the making of the contract,

and, under such denial, the plaintiff is not permitted to prove one prohibited by the statute." *Bliss Plg.*, sec. 353; *Browne Stat. Frauds*, sec. 511; *Allen v. Richard*, 83 Mo. 55.

⁴ *Reinheimer v. Carter*, 31 O. S. 579; *Headington v. Neff*, 7 O. 229; *Case v. Barber*, T. Raym. 450.

⁵ Secs. 1146, 1147, *post*.

come vested, and can not be taken away or impaired by subsequent legislation; that is, a change in legislation will not apply to causes of action that have already accrued. The statute of limitations in force at the time the action accrues governs.¹ Nor can a right which is barred by statute be revived by legislative enactment.² The statute is no longer considered as an unconscientious defense, as it was formerly, but it is now regarded as a meritorious one,³ courts going to the extent even of allowing an amendment to be made for the purpose of interposing the plea of the statute, or of filing a demurrer, raising the question after an answer has been filed in which the statute was not set up. It is not on account of any special favor which is shown to the defendant that the statute is thus considered, but it is to discourage tardiness and the prosecution of stale claims, and to prevent possible injustice where an old claim is presented, when it may be difficult to ascertain and marshal the evidence.

The statute being a privilege affects only the remedy. The defense may or may not be interposed. If it is not taken advantage of where it does not appear from the petition that the claim is barred by answer, or, if the defendant fails to demur when it is apparent from the petition that the claim is barred, the defense will be considered waived.⁴ Even when it is apparent from the petition that the claim is barred, the defendant may interpose a demurrer or file a special answer setting up the bar of the statute.⁵

Sec. 65-18. Statute of limitations—What plaintiff must allege.—We are confronted with the same question in considering the statute of limitations as in the statute of frauds. We proceed upon a theory which no one ever thought of questioning that these statutes are personal privileges—defenses—which may be waived. Then the courts adopt a remedy or method of raising the plea or defense of the statute which does not accord with the theory which has been adopted as to the nature of the statute. The courts have held that where it appears upon the face of the pleading that the cause of action is barred by the statute of limitations, then no legal cause of action is stated, and a demurrer thereto, on the ground that the petition does not state

¹ *Ham v. Kunzi*, 56 O. S. 531, 538; *Webster v. Bible Society*, 50 O. S. 1, 17.

² *Ryder v. Wilson*, 41 N. J. L. 9; *Rockport v. Walden*, 54 N. H. 167.

³ *Treasurer v. Martin*, 50 O. S. 197.

⁴ "Since the adoption of the code, as before it, the bar of the statute of

limitations must be pleaded, otherwise it is waived." *Vore v. Woodford*, 29 O. S. 245. If defendant neither demurs nor answers specially he waives the plea. *Sturges v. Burton*, 8 O. S. 215.

⁵ *Sturges v. Burton*, 8 O. S. 215.

facts sufficient to constitute a cause of action, raises the question of the statute of limitations as well as other defects in the petition.¹ Where it appears therefore upon the face of the pleading that the cause of action is barred, there must be some facts stated which will relieve the bar of the statute.² Where a new promise or acknowledgment has been made, the plaintiff may state the barred demand as a consideration of the new promise and allege the new promise in writing as the cause of action. As the saving clause of the statute requires that there shall be a written acknowledgment or a written promise to extend the period of limitation, the allegations in cases coming thereunder should conform thereto.³ If the plaintiff is able to state even a barred claim without showing on the face of the petition that it is barred, he may properly do so, leaving it for the defendant in such case to insist on it as a bar in his answer. He must specially plead the statute as a defense; he can not take advantage of it under a denial.⁴

Sec. 65-19. Res adjudicata—Some general principles considered.—Where material issues have been determined and carried into judgment by a court of competent jurisdiction, it becomes *res adjudicata* between the same parties, if it is not reversed;⁵ and this, whether the subsequent action is upon the same or different subject-matter from the first. It does not matter whether the one action be *ex contractu* and the other *ex delicto*, the principle is the same.⁶ It has been held that: "Where a judgment between parties is relied upon as an estoppel, the question is not what the court might have decided in the former action, but what it did in fact decide, as shown by the judgment."⁷ And the judgment is not conclusive unless the former record shows that the controverted point was necessarily tried and determined.⁸ In the absence of any specific showing in the record there is no presumption either way.⁹

¹ *Sturges v. Burton*, 8 O. S. 215, 220; *Seymour v. Railway Co.*, 44 O. S. 12; *Commissioners v. Andrews*, 18 O. S. 49, 67; *Keithler v. Foster*, 22 O. S. 27; *Vore v. Woodford*, 29 O. S. 27; *Combs v. Watson*, 32 O. S. 228; *Douglas v. Corry*, 46 O. S. 349.

² *Combs v. Watson*, 32 O. S. 228; *Vore v. Woodford*, 29 O. S. 27; *Phillipsburg v. Kincaid*, 50 Pac. Rep. 1093; 37 Kan. 176.

³ *Sturges v. Burton*, 8 O. S. 215, 220, 221; O. Code, sec. 4992.

⁴ *Tousley v. Moore*, 30 O. S. 184.

⁵ *B. & O. R. R. Co. v. Smith*, 54 O. S. 562.

⁶ *Hixon v. Ogg*, 53 O. S. 361; *Grant v. Ramsey*, 7 O. S. 157.

⁷ *Porter v. Wagner*, 36 O. S. 471.

⁸ *Lore v. Truman*, 10 O. S. 45, 54; *Loudenback v. Collins*, 4 O. S. 251; *Rogers v. Libbey*, 35 Me. 200; *Evans v. Beck*, 11 Ga. 265.

⁹ *Loudenback v. Collins*, *supra*.

What has been stated is appropriately applied to the general doctrine of *res adjudicata*, there being another rule, considered possibly in the light of an exception, that the doctrine of *res adjudicata* is not confined in its application to matters actually raised and decided, but will include matters which were proper and necessary subjects of adjudication, and which ought to have been set up.¹ This rule is founded upon the principle that a leading object of our codes was to enable suitors and courts in each case to avoid a multiplicity of suits and to attain a final and complete determination of all questions involved in it,² and is applicable only to matters which may be set up by way of defense, the code requiring a defendant to set up every defense that he has, and waives those not pleaded. This is the general rule, but there is an exception where the facts are sufficient to form the basis of an independent action.³ If there has been a change in the statute which will allow the protection of a right not remediable under the law existing at the time of the decision of a case, then the doctrine does not apply.⁴

Sec. 65-20. The same—Rules of pleading.—These are some of the principles underlying the doctrine of the subject of this section. The following are observations upon questions of procedure or pleading. So far as the plaintiff in an action is concerned, there is nothing to be stated by him in his petition as to any matter which the defendant might claim. But as the plaintiff can not institute a suit for the purpose of having any matter determined which was raised in the pleadings in a former action, and which was submitted to the court, his petition would be vulnerable upon demurrer if these facts appear upon the face of the pleading.⁵ The defendant to avail himself of the plea of *res adjudicata* must specially plead the facts which will show that the matters involved in a controversy have been adjudicated by a court of proper jurisdiction. The former adjudication is new matter, which the code requires should be pleaded, and evidence can not otherwise be admitted, not being admissible under a general or special denial.⁶ The plaintiff may plead former adjudication in his reply to new matter set up in the answer. Even when well

¹Hites v. Irvine, 13 O. S. 283.

²Witte v. Lockwood, 39 O. S. 141, 144; Penn v. Lockwood, 14 O. S. 302, 306.

³Witte v. Lockwood, *supra*.

⁴State ex rel. v. Ins. Co., 50 O. S. 252.

⁵Hites v. Irvine, 13 O. S. 285, 286.

⁶Fanning v. Ins. Co., 37 O. S. 344; Meiss v. Gill, 44 O. S. 253; Freeman on Judgments, sec. 283.

pleaded, or set up by way of answer, it must appear that the rights of complainant have already been determined.¹ In pleading former adjudication greater particularity should be observed than in pleading judgments generally, though the rules of pleading judgments should be observed so far as applicable. In addition to making the usual allegations showing the rendition of a judgment it should appear by appropriate averments that the matters now set up were included in the former action and adjudicated. The plea need not be certain in every particular, that is, every possible answer of the adversary need not be met and removed by anticipation. Such a plea need not aver that the former judgment remains in full force and unreversed.²

The pleadings in the former action should show that the disputed matter was directly in issue. This does not apply where the former suit involved the taking an account between numerous parties before a master, where many of the claims were orally contested.³ And if the pleadings do not show the issue, parol evidence is admissible for this purpose. Resort may be had to the opinion of the court.⁴

Sec. 65-21. Malice, when and how alleged.—Malice is sometimes an essential element of a cause of action, and in some cases not. Wherever it is an essential fact it should be alleged.

In false imprisonment, malice is not an essential ingredient of the action, although it may be alleged and shown for the purpose of enhancing the damages, but it is not of the gist of the action, and need not be alleged.⁵

In malicious prosecution, malice and want of probable cause are of the gist of the action, and must be alleged; although malice may be inferred from want of probable cause, this may not always follow, and hence malice should in all cases be alleged.⁶

In libel and slander, where the words complained of are actionable *per se*, then malice is presumed, and need not be alleged in such case,⁷ although this is not the universal

¹ Lockwood v. Wildman, 13 Ohio 450.

N. Y. 625; Harpham v. Whitney, 77 Ill. 32.

² Eversole v. Plank, 17 O. 61.

⁷ Watson v. Trask, 6 O. 533; sec.

³ Babcock v. Camp, 12 O. S. 11.

752 *post*; Robinson v. Hatch, 55

⁴ Topliff v. Topliff, 8 O. C. C. 55.

How. Pr. 55; sec. 754 *post*; Hunt v.

⁵ See sec. 560 and cases cited.

Bennett, 19 N. Y. 173; Rout v.

⁶ *Post*, sec. 780; White v. Tucker, 16 O. S. 468; McKown v. Hunter, 30

King, 7 Cow. 620.

rule. It is said that malice is an essential ingredient of actions for slander, and must be alleged; that it can not be presumed from the falsity of words, slanderous in themselves.¹ It is said by some authorities that malice must be averred.² But this is not correct upon principle, as malice is not necessarily the gist of the action, although there is authority holding that it is.³ Malice need only be alleged when it is of the essence or gist of the wrong, as in malicious prosecution. In libel and slander the falsity of the words is the essential element; and there are two grades or classes of words—those actionable *per se*, and those not actionable *per se*. The essential element in a cause of action on account of words actionable *per se* is their falsity, damages being presumed. The essential elements in a cause of action for words not actionable *per se*, are falsity and actual damage.

In either case *actual* malice *may* be alleged and proved for the purpose of enhancing the damages, but it is not in any case a necessary element. There is some conflict upon the question, but this appears to be a logically correct conclusion. Whenever malice is alleged it may be in general terms,⁴ any form of words from which it may be inferred being sufficient.⁵

Malice may be alleged and proved in an action for damages for assault and battery as a special element of damages.⁶ Malice, while not an essential element to the action, may likewise be shown in an action for malpractice.⁷

It will be always borne in mind that whenever it is not essential to the action, it must be specially alleged to be shown, and this upon the general theory of special damage.

Sec. 65-22. Time or date when to be alleged.—In some instances time and date may play an important part in a cause of action, in which event it becomes so material and essential as to render it necessary to be alleged and proved.

This occurs in the law of contract when time may be of the essence thereof. The ordinary rule of equity is that time is not of the essence of a contract,⁸ and it is not so except when parties

¹ Williams v. Gordon, 11 Bush. (Ky.) 603.

² Bates Pl., 529, 530.

³ Newell, Sland & Lib. 319; Flood on L. & S., 35.

⁴ Purdy v. Carpenter, 6 How. Pr. 361.

⁵ Townshend on S. & L., 410.

⁶ McDougal v. McGuire, 35 Cal. 274; Brzezinski v. Tierney, 60 Conn. 55.

⁷ Shuman v. Drayton, 14 O. C. C. 328.

⁸ Grey v. Tubbs, 43 Cal. 359; Steele v. Branch, 40 Cal. 4.

by their agreement so provide, each case depending upon its own facts and circumstances.¹ So when a contract does so provide, the parties have made time one of the essential facts of their transaction, and hence in an action arising therefrom, it must be alleged and proved accordingly.

In contracts of sale, time of payment may or may not be of the essence of the contract; it is not so treated unless a different intention appears from the terms of the contract.² And if no time is specified in such a contract for the delivery of goods, then the seller is bound to make delivery within a reasonable time.³

Time will also become material to a cause of action not founded on contract. If a false warranty or representation is made in a sale, the buyer may rescind the contract and restore the goods, which he must do within a reasonable time, and sue for the fraud. He can not maintain such action unless he acts promptly or within a reasonable time.⁴

So time of demand and notice is material and must be alleged and proved in an action against a drawer of a bill, or the indorser of a note.

Sec. 65-23. Suit upon divisible claims due and not due.

—If the plaintiff has demands included in one transaction due at separate times, he may bring an action for such as are due and unpaid at the time the action is brought. He is not bound to wait until all become due, and can not be defeated because one or two causes of action are not due at the time the cause of action is brought. The court, of course, at the time of rendering judgment, can not render judgment for more than is due at the time it is rendered.⁵ But an installment falling due before the trial, although not due when suit was brought, may be included in the judgment.⁶ The proper practice in such cases is not to include in the petition the claims not due at the filing of the suit, but only such as are due, and then file a supplemental petition setting up those claims falling due after the action was brought.⁷

Sec. 66. Adoption by reference. Where a petition contains one or more causes of action, and there are some allegations common to all, the question will arise whether such allega-

¹ Id.

² Benjamin on Sales, 24; Miller v. Steen, 402, 407; Hess Co. v. Dawson, 149 Ill. 138, 141.

³ Pope v. Car Co., 107 N. Y. 61.

⁴ Nelson v. Martin, 105 Pa. St. 229; Perloy v. Balch, 23 Pick. 283.

⁵ King v. Longworth, 7 O. 231; El

Reno Elec. Light Co. v. Jennison, 50 Pac. Rep. 144 (Okla., 1897).

⁶ Manning v. McClurg, 14 Wis. 350; Howe v. Lemon, 37 Mich. 164; Hanford v. Robertson, 47 Mich. 100; Malcom v. Allen, 49 N. Y. 448; Jones Mortg. 1590, 1591.

⁷ El Reno Elec. Light Co. v. Jennison, *supra*.

tions must be incorporated into and repeated in each cause of action, or whether they may be made part of such cause of action by adoption and reference. So in the case of an answer or answer and cross-petition or an amended pleading there may be an occasion for an application of the same rule.¹

There is no doubt but that this is a proper as well as a convenient practice in many instances. Such allegations may be incorporated into other causes of action, or even into answers and amended pleadings, so long as the reference is clear and definite and does not leave any doubt as to its meaning. It has been stated by way of *dictum* merely that this is a slovenly practice, and not in general to be commended, but this does not affect the rule so well settled.²

Sec. 67. Admission of evidence within the issues.—The primary object of pleading being the formation of some issue or issues which are to be decided by court or jury, it follows naturally that the plaintiff must recover, if at all, according to his pleading as well as his proof, or not at all. The plaintiff when he institutes his suit must adopt some well-defined theory upon which he bases his case, and confine his allegations and also his proof within the limits of that theory. He can not depart from that theory or adopt a new one in his reply, nor can he introduce evidence not in strict accord therewith and not within the scope of his allegations. If he has made a mistake, or has discovered new facts which will be sufficient reason to change his theory, then the proper course would be to amend the pleading.³ He

¹ See sec. 87-2, *post*.

² *Ante* sec. 20; Green v. Clifford, 94 Cal. 52; Dorr v. McKinney, 9 Allen, 859; Coe v. Lundley, 32 Ia. 437 (cross-petition); Craig v. Lovell, 88 N. Y. 258; Jasper v. Hazen, 2 N. Dak. 401; Simmons v. Fairchild, 42 Barb. 404; Brinkerhoff v. Smith, 57 O. S. 610. *Contra*, Toledo Commercial Co. v. Glen Mfg. Co., 11 O. C. C. 153. "Allegations of fact which form a part of several defenses may be once stated, and be thereafter incorporated in each successive defense by appropriate words of reference, instead of repeating them at length in each." Sparboro v. Health Dept., 49 N. Y. S. 1034; Bank v. Lee, 2 Bosw. 604; Ritchie v. Garrison, 10 Abb. Pr. 246; Jackson v. Van Slyke, 44 Barb. 116.

Reference to allegations of fact already stated in previous paragraphs of the answer may possibly import formal words of reference. But that can only be when the intention to embrace and rely upon them is clear and obvious; in other words, by necessary implication." *Id*; Loosey v. Orser, 4 Bosw. 392.

³ A plaintiff must recover according to his pleading as well as his proofs, or not at all. Boardman v. Griffin, 52 Ind. 101; Railway Co. v. Burger, 124 Ind. 275, 24 N. E. 981; Rolling Mill v. Cooper, 131 Ind. 363, 30 N. E. 294; Humpton v. Unterkircher (Iowa), 66 N. W. 776, 778, 779; Reier v. Spring Works (Mich.), 67 N. W. 120; Indiana Iron Co. v. Cray, 48 N. E. Rep. 803 (Ind., 1897).

can not be allowed to shift his ground or change his theory at the trial, and, without amendment, go to the court or jury on a question different from that set up in his petition.¹ No evidence should be admitted unless it be within the theory and the issues of the case. These are the rules which govern the procedure, but unfortunately courts do not always keep the parties within them, especially when the cause is tried to the court without a jury. Evidence is frequently in such cases admitted under objections and exceptions, to be thrown out if the court considers it improper upon final consideration. This is not a commendable practice; the admissibility of evidence should be determined at the time it is offered, and a judge in a chancery case should not permit evidence to be introduced under exceptions in the manner just stated, because, if found to be incompetent, it may prejudice his mind, and a conscientious judge should not want to hear incompetent evidence. It must be remembered that parties can not complain of error, or claim that there is a material variance if the proof is admitted without objection.² And if a party consents to litigate questions not technically within the issues, he can not thereafter complain.³

¹ Wolf v. Di Lorenzo, 47 N. Y. S. 719 (City Court N. Y., 1897).

² May v. Menton, 47 N. Y. S. 179; Stiefel v. Novelty Co., 42 N. Y. S. 511.

³ Kafka v. Levensohn, 41 N. Y. S. 368; Frear v. Sweet, 118 N. Y. 454; Cook v. Haan, 47 N. Y. S. 131.

CHAPTER 6.

THE ANSWER, COUNTER-CLAIM AND SET-OFF.

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| <p>Sec. 68. General requisites of answer.</p> <p>68a. Constituent parts of an answer.</p> <p>69. The specific denial.</p> <p>70. The general denial.</p> <p>70a. Evidence admissible under the general denial.</p> <p>70b. Pleading matter admissible under general denial.</p> <p>71. Immaterial allegations need no denial.</p> <p>71a. Effect of failure to deny allegations.</p> <p>72. Denial on belief.</p> <p>73. The negative pregnant.</p> <p>74. Sham denial.</p> <p>74-1. The defense—Nature of under code.</p> <p>74-2. Entire and partial defenses.</p> <p>74-3. Equitable defenses—Counter-claims and set-off—Their nature.</p> <p>74-4. The same—Equitable defenses how pleaded.</p> <p>74-5. New matter defined and explained.</p> <p>75. New matter—General rules.</p> | <p>Sec. 75-1. Payment when new matter.</p> <p>75-2. Contributory negligence when new matter.</p> <p>76. Joint answer.</p> <p>77. Answer of guardian and attorney.</p> <p>78. Several defenses.</p> <p>79. Answer and cross-petition.</p> <p>79-1. Cross-petition against co-defendant.</p> <p>79-2. Cross-petition must be complete in itself.</p> <p>80. Counter-claim—Defined—Nature of.</p> <p>81. Counter-claim—How pleaded.</p> <p>82. Counter-claim—When may be set up—Judicial expositions.</p> <p>83. Trial on counter-claim.</p> <p>84. Set-off.</p> <p>85. What subject of set-off.</p> <p>86. Cross-demands deemed compensated.</p> <p>87. Judgment upon default.</p> <p>87-1. Does a general denial need a verification.</p> <p>87-2. Adoption of language of one defense into another.</p> |
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Sec. 68. General requisites of answer.—The same course will be pursued in treating the subject of the answer as in the preceding chapter upon the petition. As the work is made up largely of special treatment of particular actions and subjects, answers are there discussed more in detail. Only the more general features, therefore, will be examined here. In

doing so it is difficult to add much that is new, or to improve upon what others better qualified have already written. All writers start out upon the same basis. The answer shall contain: first, a general or specific denial of each material allegation of the petition controverted by the defendant; second, a statement of any new matter constituting a defense, counter-claim or set-off in ordinary and concise language.¹ The same rules of verification are applicable here as given in a former section.² Prayer for relief is unnecessary unless affirmative relief is sought.³ The rules as to the statement of facts,⁴ conclusions⁵ and presumptions of law,⁶ redundant and irrelevant matter⁷ and pleading conditions,⁸ as pointed out elsewhere, should be observed in the preparation of the answer.

Sec. 68a. Constituent parts of an answer.—The constituent parts of an answer are: first, a general or specific denial of each material allegation of the petition controverted by the defendant; second, a statement of any new matter constituting a defense, counter-claim or set-off.⁹ Under the common-law procedure the plea was either dilatory, plea in estoppel, a traverse or by way of confession and avoidance. In place of the dilatory pleas we have motions which accomplish the same results. We do not have pleas in abatement, strictly speaking, but matters in abatement are set up by answer.¹⁰ The denials, general or special, take the place of the common-law traverse; the new matter corresponds to the plea by way of confession and avoidance. Each one of these parts will be separately discussed.

Sec. 69. The specific denial.—Material uncontroverted allegations are taken as true.¹¹ The answer must, therefore, contain a general or specific denial of each material allegation in the petition.¹² A denial of facts, whether general or special, should be direct and specific.¹³ What is a specific denial? The answer must depend largely upon circumstances, though there are a few general rules which have been frequently asserted by courts and writers. It is apparent that it was designed

¹ O. Code, sec. 5070.

² *Ante*, sec. 49.

³ *Bendit v. Annesley*, 27 How. Pr. 184.

⁴ *Ante*, sec. 50.

⁵ *Ante*, sec. 51.

⁶ *Ante*, sec. 55.

⁷ *Ante*, sec. 56.

⁸ *Ante*, sec. 59.

⁹ O. Code, sec. 5070.

¹⁰ *Weil v. Guerin*, 42 O. S. 299.

¹¹ *Livesay v. Brown*, 52 N. W. Rep. 838 (Neb., 1892).

¹² O. Code, sec. 5070; *Creighton v. Kellermann*, 1 Disn. 548; *Everett v. Waymire*, 30 O. S. 308.

¹³ *Insurance Co. v. Meier*, 28 Neb. 124.

that the defendant should point out the particular allegations denied. How well it may be done must depend upon the pleader's skill in the English language and his legal acumen. There have been many expressions of opinion upon a form of averment frequently adopted: Defendant denies each and every allegation of the petition not before admitted or denied. It is generally considered good.¹ Another form often used, which upon a liberal construction has been held good as against a demurrer, is: "The defendant denies all the material allegations of the petition."² It does not authorize the introduction of evidence tending to show a special defense;³ nor is it a commendable or proper form to be followed.⁴ So has it been held that merely denying "each and every material allegation in the complaint" is evasive and not proper.⁵ A denial of all and singular the allegations of a petition is also objectionable, and subject to a motion to make definite and certain.⁶ A denial that there is anything due the adverse party is a mere legal conclusion and without effect.⁷ Nor is the refusal to admit certain allegations considered a denial,⁸ or a denial of facts as alleged in the petition.⁹ How, then, should the denial be made? Judge Maxwell says that "each and all" or "each and every" of the allegations referred to is the proper mode.¹⁰ Mr. Bliss says that most pleaders deny in terms the fact affirmed, as "the defendant denies that," etc., or "the defendant says that it is not true that," etc.¹¹ The latter is in keeping with the idea of a specific denial. It contemplates pointing out the particular averment.

Sec. 70. The general denial.—A general denial may be made only when the whole cause of action contained in the petition is assailed. It should be made only after a careful consideration of the defense outlined. It is a dangerous weapon unless in careful hands. It is quite important that

¹ Griffin v. Railroad Co., 101 N. Y. 348; Smith v. Gratz, 59 How. Pr. 274. It is good as against a general demurrer. Reucher v. Hudson, 1 Clev. Rep. 218; Bliss on Code Pldg., sec. 325, citing Kingsly v. Gilman, 12 Minn. 515; Leyde v. Martin, 16 Minn. 38.

² Lewis v. Coulter, 10 O. S. 451.

³ Hauser v. Metzger, 1 C. S. C. R. 164.

⁴ Lewis v. Coulter, *supra*; Thomas v. Cline, 1 Clev. Rep. 123.

⁵ Coal Co. v. Sanitarium Co. 7 Utah, 158, 161 (1891); Mattison v. Smith, 19 Abb. Pr. 290.

⁶ Lawrence v. Cooley, 1 Clev. Rep. 178.

⁷ Bank v. Lloyd, 18 O. S. 353.

⁸ Bomberger v. Turner, 13 O. S. 263.

⁹ Insurance Co. v. Meier, 28 Neb. 124.

¹⁰ Maxwell on Code Pldg., p. 386.

¹¹ Bliss on Pldg., sec. 325.

the pleader is certain that his defense can be substantiated under it. Nothing can be more humiliating than to be suddenly interrupted in the progress of a trial by a ruling preventing the introduction of evidence under a general denial, thus causing an amendment of the answer and expense to the client. What may be shown under a general denial and what may not, has been fully discussed whenever it has arisen in the chapters on the special subjects. While it is a very important pleading, it seems unnecessary to here fully review the authorities merely for convenience. The reader is, therefore, asked to consult the index for what may be shown under it, a few illustrative cases being noticed here. A general denial controverts every allegation in the petition. The form should be, "each and all" or "each and every" allegation in the petition.¹ The general denial introduced by the code bears no relation or resemblance to the general issue at common law, in that under the latter many more defenses could be introduced to defeat the action than can now be under the general denial. Under the general issue of *non est factum* to a debt on specialty, a defendant could at common law show that he never executed a deed, or that for some reason it was void in law, or that it had been altered.² Under the code general denial, a defendant can not truthfully deny that he executed a deed when it has been altered since execution, and hence not his deed because altered. The alteration should be pleaded. The general issue controverted all material allegations and allowed a defendant to introduce new matter constituting a defense.³ Under the general denial a defendant can only controvert or disprove the facts alleged in the petition;⁴ so that it follows that defenses such as payment, release, accord and satisfaction, and many other entire and partial defenses⁵ which avoid, but do not deny, must be specially pleaded in the answer as new matter.⁶ Hence the importance of an understanding of the subject is thus illustrated. A general denial does not, according to some authority, controvert the right of a corporation to sue;⁷ nor can justification⁸ or a former recovery⁹ be shown under it. But

¹ *Lewis v. Coulter*, 10 O. S. 451.

² *Stephen's Pldg.*, p. 171.

³ *Bliss on Code Pldg.*, sec. 324.

⁴ *Swan's Pldg.*, pp. 246-7.

⁵ *See Index.*

⁶ *McKyring v. Bull*, 16 N. Y. 297.

⁷ *National Life Ins. Co. v. Robinson*, 8 Neb. 452. See 9 O. C. C. 418.

⁸ *Duval v. Davey*, 32 O. S. 604.

⁹ *Allen v. Saunders*, 6 Neb. 436.

contributory negligence,¹ mitigating facts in some instances,² or a contract different from that set forth in the petition, may be shown.³ A demurrer does not lie to a general denial because it does not state facts sufficient to constitute a defense,⁴ though it has been held otherwise where one paragraph contains a general denial and the other a special plea, in a case where every material averment could have been proven under a general denial.⁵ A general denial should not be interposed when the defendant knows that a part of the allegations are true, as this would be in direct violation of the letter and spirit of our code.⁶

Sec. 70a. Evidence admissible under general denial.

—The general rule governing the admission of evidence under a general denial may be stated in few words, the difficulty being in its application to cases. As has already been explained, a general denial controverts all the essential averments made by the plaintiff which he must prove to maintain his cause of action, so that it necessarily follows that a defendant has the right to introduce under such denial any evidence tending to disprove anything which the plaintiff is bound in the first instance to prove to make out his cause of action. A distinct, affirmative defense can not be given in evidence, under a general denial, but defendant is limited to a contradiction of plaintiff's proofs, and the disproval of his case.⁷ What may be shown then under a general denial depends upon the case made by the plaintiff and what he must prove to sustain his cause, and also upon what is new matter constituting an affirmative defense, which must be determined in each case solely from the allegations made by the plaintiff. New matter is where the matter set up by plaintiff is admitted, and the

¹ Railroad Co. v. Rutherford, 29 Ind. 82.

² Barholt v. Wright, 45 O. S. 177.

³ Despatch Line v. Glenny, 41 O. S. 166.

⁴ Fletcher v. Jones, 19 N. Y. S. 47; Nix v. Gilmer, 50 Pac. Rep. 131 (Okla., 1897); Miller v. Brumbaugh, 7 Kan. 343.

⁵ Toledo, etc., R. R. Co. v. Stephenson, 131 Ind. 203; 30 N. E. Rep. 1062 (1892).

⁶ M. & C. P. Co. v. Fogarty, 9 O. C. C. 418.

⁷ Robinson v. Frost, 14 Barb. 536; McKyring v. Bull, 16 N. Y. 297; Wheeler v. Billings, 38 N. Y. 263; Weaver v. Barden, 49 N. Y. 286; Griffin v. Railroad Co., 101 N. Y. 348; Glazer v. Clift, 10 Cal. 303; Piercy v. Sabin, 10 Cal. 22; Bruce v. Foley, 50 Pac. Rep. 935 (Wash., 1897); St. Felix v. Green, 52 N. W. Rep. 821 (Neb., 1892).

facts alleged by defendant avoids it, not where the matter set up by defendant denies plaintiff's allegations.¹ A defense that concedes that the plaintiff once had a good cause of action, but insists that it no longer exists, because new facts have arisen, involves new matter.² These rules are simple enough, and there ought not to be much difficulty in their practical application.

There is a wide distinction between the issues, and what evidence is admissible thereunder, under the common-law general issue and the code general denial.³ The latter controverts all the allegations in the complaint, and under it the defendant can not give in evidence matter which could be formerly introduced under the general issue. Under the former system, almost every matter in discharge of the action could be given under the general issue. The object of pleading is to inform the court and jury of the issues, and to show each side what they must meet. The liability of the defendant depends upon what construction the court will place upon the facts alleged by the plaintiff.

By the general issue it was meant to deny the allegations of the declaration, but by acts of Parliament special matter was allowed to be shown under it to such an extent that the plaintiff could not foretell what defense he would meet at the trial. As a denial can only put in issue the constituent facts alleged by the plaintiff, the plaintiff is therefore prepared to prove only those facts which he has alleged, and not to disprove any facts which have occurred subsequent to the transaction set forth by him, and which, to be shown by defendant, must be alleged specially. If the defendant under his denial is permitted to prove almost everything in discharge of the action, the plaintiff can not be properly prepared with his evidence. Consequently the rule is that the evidence is limited to the allegations by the plaintiff.

Sec. 70b. Pleading matter admissible under denial.—

A defense can only consist of new matter, that is, matter which confesses and avoids, which must be specially alleged, and which can not be shown under a denial. As a general denial raises an issue upon all the essential averments in plaintiff's petition, it casts the burden of proof upon plaintiff, and enables the defendant to disprove any essential fact which plaintiff must establish to maintain his cause. Hence it follows that it would be

¹ Gilbert v. Cram, 12 How. Pr. 455.

³ Oleson v. Hendrickson, 12 Ia. 222;

² Chitty Pl. 472; Gilbert v. Cram, *supra*; Piercy v. Sabin, 10 Cal. 22,

Hagan v. Burch, 8 Ia. 309; Scott v. Morse, 54 Ia. 732.

improper to plead specially any matter which may be proved under a denial.¹

Sec. 71. Immaterial allegations need no denial.—What constitutes a material allegation has been pointed out elsewhere.² It has also been shown that legal conclusions should not be pleaded,³ which must therefore be classed with immaterial allegations needing no denial. An issue can not be raised unless a material allegation be denied. Legal conclusions are vicious because they ordinarily state only abstract propositions of law, not facts. Infrequently facts may be so stated, and, in the absence of objections thereto for indefiniteness, may when denied raise an issue, upon which a judgment may be rendered.⁴ Such cases are so rare that the rule that a denial of a conclusion of law does not raise any issue upon the facts alleged, may be considered universal.⁵ Denying that there is anything due or owing the plaintiff does not controvert an allegation that no part of a certain sum has been paid.⁶ But such a general denial should not be disregarded and a judgment rendered thereon.⁷ As against a demurrer, a general allegation of indebtedness has been held sufficient.⁸ There is conflict of judicial opinion upon the question whether or not an averment of damages is an issuable traversable fact, some holding the affirmative,⁹ others the negative.¹⁰ The latter is the better view.

Sec. 71a. Effect of failure to deny allegations.—Issues are formed by an affirmation on the one side and a denial on the other, of a material allegation, that is, one that is essential to the claim or defense. Therefore, every material allegation which is not denied will be taken as true or as admitted for the purposes

¹ *Van Hagan v. Waterbury Mfg. Co.*, 49 N. Y. S. 465; *Flack v. O'Brien*, 43 N. Y. S. 854; *Green v. Brown*, 49 N. Y. S. 163.

² *Ante*, sec. 52.

³ *Ante*, sec. 51.

⁴ *Trustees v. Odlin*, 8 O. S. 293. A denial of a conclusion of law puts in issue every fact necessary to support the same. *Evans v. Cricket*, 2 W. L. M. 603.

⁵ *Emory v. Balz*, 94 N. Y. 408.

⁶ *Larimore v. Wells*, 29 O. S. 13; *Bank v. Lloyd*, 18 O. S. 353; *Rail-*

road Co. v. Walker, 45 O. S. 577-83; *Lake v. Steinbach*, 5 Wash. St. 659; 32 Pac. Rep. 764.

⁷ *Lewis v. Smith*, 2 Disn. 434.

⁸ *Lewis v. Smith*, 2 Disn. 434; *Flowers v. Slater*, 2 W. L. M. 445.

⁹ *Hudson v. Road Co.*, 45 Cal. 550; *Pimmick v. Campbell*, 31 Cal. 238.

¹⁰ *Gill vs. Sells*, 15 O. S. 195; *Bartlett v. Braunsdorf*, 57 Wis. 1; *Malony v. Dows*, 15 How. Pr. 261; *Raymond v. Trabbam*, 12 Abb. Pr. 52; *Jenkins v. Sleanka*, 19 Wis. 126.

of the action, rendering it unnecessary to introduce evidence in proof thereof.¹

A denial must be clear, unambiguous and not evasive. In determining whether a denial is evasive, each separate denial of each separate allegation must be taken by itself.² An admission by the defendant may be either implied or express in form. It is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms.

It has been considered that an allegation in an answer setting up an affirmative defense which has no reference to and does not admit any allegation in the complaint is not an admission, where the answer also contains a denial of all the allegations in the complaint, which is inconsistent with the affirmative defense.³ It is only facts which are well pleaded that are admitted by failure to deny them, so that legal conclusions are not thus admitted.⁴

Sec. 72. Denial on belief.—A practice has been adopted of accompanying a denial with a statement that it is made upon information and belief, giving reasons therefor in some instances. This has been approved by the courts.⁵ A person may not have personal knowledge of the truth or falsity of allegations, yet may have information which satisfies him of their falsity, and it would lead to injustice to disallow such a denial.⁶ This rule, however, can not be permitted to be abused so as to evade the statute requiring a positive verification.⁷

In some of the states there is a special provision authorizing a denial upon information and belief, and in such cases the denial must be in strict conformity to the statute.⁸ A denial of "any knowledge or information concerning the matters alleged sufficient to enable the defendant to form an opinion respecting them," has been approved.⁹ The rule allowing this form of denial can

¹ *Singer Mfg. Co. v. Billings*, 39 Ia. 347; *Livesay v. Brown*, 52 N.W. Rep. 838 (Neb., 1892); *Merguire v. O'Donnell*, 103 Cal. 50; *Burke v. Water Co.*, 12 Cal. 403.

² *Racouillat v. Rene*, 32 Cal. 450.

³ *Kelly v. Theiss*, 49 N. Y. S. 1108; *Ferris v. Hard*, 135 N. Y. 354.

⁴ *Alston v. Wilson*, 44 Ia. 130.

⁵ *State ex rel. v. Commissioners*, 11 O. S. 183; *Bennett v. Manufacturing Co.*, 110 N. Y. 150; *Raymond v. Wimsette*, 12 Mont. 551; 31 Pac. Rep. 537; *McKenzie v. Insurance Co.*, 2 Disn. 223; *Roberts v. Glenn*, 1 Clev. Rep. 194.

⁶ *Brotherton v. Downey*, 21 Hun, 436; *Jones v. Petaluma*, 36 Cal. 230; *Bennett v. Manufacturing Co.*, *supra*.

⁷ *Bliss on Code Pldg.*, sec 326.

⁸ *Solomon v. Brodie*, 50 Pac. Rep. 1045; *Pomeroy's Code Rem.*, sec. 640; *James v. McPhee*, 9 Colo. 493.

⁹ *State ex rel. v. Commissioners*, 11 O. S. 183. ("To authorize a denial of an allegation in a petition, a want of belief is sufficient, and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief.") *McKenzie v. Insurance Co.*, 2 Disn. 223.

only extend to cases where the fact charged is not within the defendant's knowledge, or can not be presumed to be within his knowledge. When facts are or ought to be within his knowledge, they should be alleged positively.¹ Nor is a defendant permitted to adopt this form of denial where the facts are readily ascertainable from the public records.² Such denials may be stricken out on motion or disregarded by the court.³

Sec. 73. The negative pregnant.—A negative pregnant falls within an argumentative denial, neither of which is permissible, as the rules of pleading require the pleader to state his position in direct and positive form. An argumentative denial presents the reasons for the denial, or shows by argument that the averments in the petition are not true.

A denial in the precise language of the petition is a negative pregnant. It is not a denial, but an admission that the alleged facts may have transpired on some other day or under different circumstances.⁴ A denial of the exact value as alleged is an admission of any less value.⁵ And so a denial of payment on a date named is an admission that it was made upon some other day.⁶ And a denial in the language of a petition that a defendant carelessly, negligently and wantonly ran over the plaintiff's horse is not a denial of the injury complained of.⁷ The inquiry would naturally arise, What shall be done with an answer containing a negative pregnant? Mr. Bliss has stated the Missouri and Iowa rule to be that the pleading is not treated as a nullity, but that it is only an informality.⁸ In both states, in the absence of an objection, it was sustained as a denial raising an issue.⁹ Rules of law are evidently flexible and not always controlled by logical precision, and are established to be followed or taken advantage of if parties so desire, otherwise not. A rule descends to us from the common law, is adopted and becomes part of our system, that a negative pregnant is not a denial but an admis-

¹ *Hardman v. Railway Co.*, 14 W. L. B. 346.

² *Mullally v. Townsend*, 50 Pac. Rep. 1066 (Cal., 1897); *Mulcahy v. Buckley*, 100 Cal. 486.

³ *Id.*

⁴ *Coal Co. v. Sanitarium*, 7 Utah, 158 (1892); *Robbins v. Lincoln*, 12 Wis. 9; *Miller v. Brumbaugh*, 7 Kan. 343; *Seward v. Miller*, 6 How. Pr. 312.

⁵ *Caldwell v. Same*, 45 O. S. 512-20; *Scovill v. Barney*, 4 Oreg. 288.

⁶ *Argard v. Parker*, 81 Wis. 581 (1892); *Schaetzel v. Insurance Co.*, 22 Wis. 412.

⁷ *Harden v. Railroad Co.*, 4 Neb. 521; *Bliss' Code Pldg.*, sec. 332; *Coal Co. v. Sanitarium Co.*, *supra*.

⁸ *Bliss on Code Pldg.*, sec. 332; *Maxwell on Code Pldg.*, p. 16.

⁹ *Doolittle v. Greene*, 32 Iowa, 123; *Bank v. Hogan*, 47 Mo. 472.

sion. Yet, as just shown, courts hold it to be an informality and not a nullity, which is not at all consistent with the rule. The rule that parties must tender an issue should universally be observed by both pleader and court. If the latter does not the former will not. An issue can not be tendered by a negative pregnant, and when such a case is presented and not discovered or objected to by counsel, the court should display superior knowledge by seeing beyond counsel and refusing to hear the case until issues are properly made up. The plaintiff may file a motion to have the defect corrected.¹ Indeed, it seems that a court would be justified in rendering a judgment when payment is attempted to be controverted in the form of a negative pregnant, as it is an admission.

Sec. 74. Sham denial.—The purpose of verification of pleadings is to insure good faith and to prevent false statements therein, and thereby guard against what are termed sham pleadings. Sham pleadings were not allowed at common law, and so under the code. A false denial may, in common parlance, be termed a sham denial, and should be stricken from the files upon motion. It has even been held that a court may hear evidence to determine the question of *bona fides* or falsity.² Substantially the same practice was pursued at common law. Parties were permitted to file a motion setting up the falsity, supported by affidavits.³ But the courts of New York refuse to enter into the question when it needs argument to demonstrate the fact that it is sham,⁴ and will not disturb a denial of a material allegation.⁵

¹ Wall v. Water Co., 18 N. Y. 119.

² Wertheimer v. Morse, 23 W. L.

B. 455. This practice has been questioned in Werk v. Christie, 9 O. C. C. 439. "An answer can be said to be frivolous only when it is so clearly bad as to require no argument," says Justice Rumsey in the case of Gruenstein v. Jablonsky, 1 App. Div. 580, 37 N. Y. Supp. 538, "to show its character, and which would be said to be so manifestly defective as to be indicative of bad faith upon a mere inspection. Strong v. Sproul, 53 N. Y. 497. Unless it appears by inspection of the pleading that it raises no issue upon any fact which the plaintiff must prove, it is not frivolous, however

objectionable it may be in other respects."

A verified answer which denies a material allegation of the complaint can not be stricken out as frivolous, even though the denial is upon information and belief, and although it appears highly improbable that the defendant should not have been aware of the exact facts. Trumbull v. Ashley, 49 N. Y. S. 786.

³ Thomas v. Vandermoolen, 2 Barn. & Ald. 197; Shadwell v. Berthond, 5 Barn. & Ald. 750; Young v. Gaderer, 1 Bing. 380.

⁴ Metzger v. Met. El. R. Co., 21 N. Y. S. 676.

⁵ Zivi v. Einstein, 21 N. Y. S. 676. See *post*, sec. 122.

If shown to be false and sham as to part of the averments it may be stricken from the files, though the answer contain other allegations by way of defense.¹

A general denial should not be interposed by a defendant who has knowledge that a portion of the allegations which he is denying are true,² and where such a denial is filed and not stricken from the files upon motion, it ought, in the interest of justice and fairness in procedure, to be disregarded upon trial and all later proceedings.

Sec. 74-1. The defense—Nature of under code.—The answer may contain new matter which constitutes a defense, counter-claim and set-off. A defense is something different from a counter-claim or set-off. It is a right possessed by the defendant, arising from the facts alleged in his pleading which defeats the plaintiff's claim for the remedy which he demands by his action.³ A defense must contain new matter which is outside of the issues raised by a general or special denial, and nothing should be pleaded as a defense the burden of proving which does not rest upon the defendant. For instance, contributory negligence may be shown under a denial, and the burden of proving freedom therefrom rests upon the plaintiff, who sustains the relation of servant to a master in an action by the former against the latter, and hence it would not be in such case a defense. A denial, then, is not a defense.⁴

Defendant may set forth as many grounds of defense as he may have, legal or equitable, which must be separately stated and numbered, and refer in an intelligent manner to the causes of action which they are intended to answer.⁵ There is no limitation upon the number of defenses which he may have except that they shall be verified. If two grounds plainly contradict each other, then they can not be verified, and if such an answer were placed on file it should be stricken from the files on motion. This, however, is subject to another rule, that where a defendant has two or three defenses, but does not know which is the true one, and can not foretell until trial, it is competent for him to set them up in his answer if they can be stated in such form as will permit of verification.⁶ The new matter set up by way of defense does not join issue upon the facts stated in the petition,

¹ *Sherman v. Boehm*, 13 Daly, 42.

⁴ *Green v. Brown*, 49 N. Y. S. 163.

² *Memphis & C. P. Co. v. Fogarty*,

⁵ O. Code, sec. 5071.

9 O. C. C. 418.

Bank v. Closson, 29 O. S. 78.

³ *Pomeroy's Code Rem.* sec. 90.

but tenders an issue upon the facts stated in the answer, which, if not controverted by a reply, will be taken as true.¹

Sec. 74-2. Entire and partial defenses.—A rule prevailed under the common-law procedure that a defendant could not plead what was termed a partial defense, that is, one that did not operate as a bar to the whole cause of action. It was essential that each defense should be a complete bar or answer to the declaration. This was a hard rule and its effect was often avoided by setting up a pretended complete defense.

The code contemplated a change of this rule, by enacting that a defendant may set up as many defenses as he may have, the only limitation prescribed being that they must be such defenses as may consistently be verified.

Some courts, however, have not considered that the code intended a complete change or an entire abolition of this rule, for they have held that the old rule that a defense which professes to answer the whole cause of action, but does not, is bad, is applicable under the code. The rule under the code is not stated in that manner, but it is considered that a partial defense must be specially pleaded as such, and must not appear as a complete and entire defense; and if not so pleaded it will be subject to a demurrer.² This can not be applied to a counter-claim or set-off,³ as we have elsewhere shown the distinction between a defense, counter-claim or set-off.

In Ohio it has been considered "not necessary that an answer to a petition seeking equitable relief should set up a *complete defense* to the action. It is enough that it deny, or confess and avoid, some *material part* of the plaintiff's case, so as to modify or abridge his right to relief." Where "an answer does not profess to be, or is not from its nature necessarily pleaded as a *bar to the action*, a demurer to it raises no question of its sufficiency as such."⁴ The code provides that when all or part of the cause of action are not put in issue by answer, judgment may be taken by default for so much as is not put in issue.⁵ This contemplates the filing of a partial defense but does not say how it shall be pleaded, but the quotation above given seems to make the rule in Ohio different from other states, at least in chancery cases. It is also allowable in New York to plead partial defenses.⁶

¹ Powers v. Armstrong, 36 O. S. 357, 360.

² Fitzsimmons v. City F. Ins. Co., 18 Wis. 234; Pomeroy's Code Rem. secs. 607, 608. Thompson v. Halbert, 109 N. Y. 329.

³ Dodge v. Dunham, 41 Ind. 186.

⁴ Peebles v. Isaminger, 18 O.S. 490, 492.

⁵ O. Code, sec. 5320; Weaver v. Carnahan, 37 O. S. 363; Moore v. Woodside, 26 O. S. 537.

⁶ N. Y. Code Pro. sec. 508.

Sec. 74-3. Equitable defenses—Counter-claims and set-off—Their nature.—Under the common-law procedure there could be no such thing as an equitable defense to an action at law, but the defendant, if he had an equitable claim against the plaintiff, would have to submit to judgment against him in the action at law, and then prosecute his equitable claim against plaintiff by an independent suit in equity. Under the code parties may settle all their controversies in one action, and thus avoid a multiplicity of suits. How the issues thus arising shall be tried has been fully explained elsewhere.¹

The new matter constituting an equitable claim which the defendant sets up may be only a defense, something without affirmative equity relief, which will be a bar to the plaintiff's cause.² The earlier courts seemed to find some difficulty in the matter of equitable defenses. Some were not inclined to uphold equitable defenses so long as the parties treated them as mere defenses, and did not seek affirmative relief.³ Others held that the defendant could set up an equitable but could not have any affirmative relief.⁴ These positions, being untenable, naturally had to be

¹ Ch. 10-A, sec. 137-7; 3 Pom. Eq. Jur. sec. 1368.

² Dobson v. Pearce, 12 N. Y. 156, 165; Pennoyer v. Allen, 51 Wis. 360. Richardson v. Bates, 8 O. S. 257, is an example; Kelly v. Doe, 2 N. Y. Sup. Ct. 286.

A discussion by Mr. Pomeroy (Code Rem. sec. 91) on this point is interesting. It is to the effect "that a defendant can not avail himself, as a defense, of facts entitling him to equitable relief against the plaintiff's legal cause of action, unless he does it by demanding and obtaining that specific remedy which, when granted, destroys the cause of action; in other words, he can not invoke the right *as long as he treats it and relies upon it as a defense*. If he does not institute a separate action based upon his equitable right, and recover the specific relief therein, and restrain the pending action at law, affirmatively demand the equitable remedy, and this remedy must be conferred upon him. If he simply

avers the facts as a negative defense, he will not be permitted to rely upon them and to defeat the plaintiff's recovery by that means.

* * * The error of this doctrine has already been demonstrated. A defense is a negative resistance, an obstacle, a something which prevents a recovery, whether it be equitable or legal. If every equitable defense, in order to be available, must consist in an affirmative recovery of specific relief against the plaintiff, or at least in the right to recover such relief if the defendant choose to enforce it for exactly the same reasons, and with exactly the same force, it might be said that every legal defense, in order to be available, must consist of an off-set or counter-claim. In fact, the codes, without exception, recognize the correctness of the rule."

³ Pomeroy's Code Rem. sec. 91 and cases; also 3 Pomeroy's Eq. Jur. sec. 1369 and cases.

⁴ Haire v. Baker, 5 N. Y. 357.

abandoned, and the right to set up an equitable defense as a mere defense, and an equitable claim upon which affirmative relief was asked, became well settled.¹

If the equitable claim set up by the defendant demands affirmative relief, then it can not be called strictly a defense. "A defense is a negative resistance, an obstacle, a something which prevents recovery."² It does not change the character of plaintiff's action, or demand a different mode of trial so long as no affirmative relief is asked, but the trial is governed by the nature of plaintiff's cause of action.³ But if affirmative relief is asked, then a new feature is injected into the action. It is of the same nature as a suit in chancery under the former practice. What shall it be called? It can not be a mere defense; the only other name that can be ascribed to it is either a counter-claim or set-off, as the code provides what the constituents of the answer shall be. A counter-claim or set-off may be equitable as well as legal.⁴ A counter-claim must arise out of the contract or transaction set forth by plaintiff. A set-off can only be pleaded in an action founded on contract, or ascertained by the decision of a court.

Under the former practice in chancery the respondent was limited in his cross-bill to the same matters which were set up in the bill.⁵ And so a set-off could be of an equitable nature⁶ and likewise a counter-claim.⁷

This justifies the argument at another place⁸ as to the mode of trial that there is a clear distinction as to how causes to which only a defense is interposed, and those to which a legal or equitable claim constituting a counter-claim or set-off is set up in the answer and affirmative relief asked, shall be tried. The theory upon which an equitable claim by the defendant in which he

¹ *Dobson v. Pearce*, 12 N. Y. 156, 165; *Pitcher v. Hennessy*, 48 N. Y. 415, and cases cited; *Harrington v. Fortner*, 58 Mo. 468; *Hammond v. Perry*, 38 Ia. 217; *Chase v. Peck*, 21 N. Y. 581; *Cavalli v. Allen*, 57 N. Y. 508, 514; *Richardson v. Bates*, 8 O. S. 257, 264.

² *Pomeroy's Code Rem.*, sec. 91.

³ *Smith v. Anderson*, 20 O. S. 76, sec. 137-6.

⁴ *Currie v. Cowles*, 6 Bosw. 452; *Wemple v. Stewart*, 22 Barb. 154; *Pomeroy's Code Rem.*, sec. 91.

⁵ *Burns v. Nevins*, 27 Barb. 493;

Estee's Pl. 3365; *Story's Eq. Pl.*, 391a, 392.

⁶ *Russell v. Conway*, 11 Cal. 93; *Burton v. Willin*, 6 Houston, 522. *Martin, J.*, in *Baker v. Kinsey*, 41 O. S. 403, 409, says that sec. 5076, of the Code, as to bringing new parties in, refers exclusively to an equitable set-off. See *Gildersleeve v. Burrows*, 24 O. S. 204; *Miller v. Florer*, 15 O. S. 148, 2 *Pomeroy's Eq. Jur.*, sec. 706; *Pomeroy's Code Rem.*, secs. 163-170.

⁷ *Currie v. Cowles*, 6 Bosw. 452; *Wemple v. Stewart*, 22 Barb. 154.

⁸ *Sec. 137-7.*

asks affirmative relief is tried to the court is, that it is either a counter-claim or set-off. The equitable defense or claim should be first tried.¹

There is a general rule of law that where a party has a complete defense at law to an action he can not resort to equity.²

Sec. 74-4. The same—Equitable defenses how pleaded.

—The defendant must specially plead an equitable defense, counter-claim or set-off with the same particularity as if in an independent suit.³ An equitable defense can not be shown under a general denial.⁴

Sec. 74-5. New matter defined and explained.—The denials, the nature and kinds of defenses, have been explained, and an attempt will now be made to throw some light upon the defense of "new matter." The "new matter" may either constitute merely a (1) defense, or (2) a counter-claim or (3) set-off. New matter has been variously defined; in framing a definition the relation which it assumes to the matter stated in the petition must be clear. As to this, there is some diversity of opinion. Under the code when a defendant files an answer setting up "new matter" constituting a defense, counter-claim or set-off, what does or must he say as to the cause of action alleged by the plaintiff? Does or can he deny it, any part or all of it? If the "new matter" is to be considered as of the same effect and nature as a plea by way of confession and avoidance, then such a course would be improper. Such a plea, as we are well aware, must give color, by which is meant that it must expressly or impliedly admit that the plaintiff has an apparent right; it confesses that but for the matter of avoidance the plaintiff's action could be maintained.⁵ The consensus of opinion is in favor of this view, and that the answer which sets up new matter should now, as formerly, expressly or impliedly, admit the plaintiff's cause of action.⁶

¹ Martin v. Zellerbach, 38 Cal. 300; 99 Am. Dec. 365.

² Bank v. Weyand, 30 O. S. 126; Metler v. Metler, 3 C. E. Green, 272.

³ Powers v. Armstrong, 36 O. S. 357; Stewart v. Hoag, 12 O. S. 623; Carpentier v. Oakland, 30 Cal. 439; Bruck v. Tucker, 42 Cal. 348.

⁴ Powers v. Armstrong, *supra*; Stewart v. Hoag, 12 O. S. 623.

⁵ Corner v. Johnson, 2 Denio, 96; Steph. Pl. 200.

⁶ Anson v. Dwight, 18 Iowa, 241.

("The rule obtains under the code, as under the common-law system of pleading, that the answer, or a count thereof, seeking to avoid the cause of action stated in the petition, by new matter, should confess directly or by implication that but for such new matter the action could be maintained.")

Bliss Plg., sec. 340. ("It is difficult to see how one can allege new facts showing a non-liability that do not suppose the existence of a lia-

New matter, as the expression is used in the code, is extrinsic to the matter set up by plaintiff as the basis of the cause of action; it is matter which is not stated by plaintiff, some which presents a new issue which if proven true rather than that which plaintiff alleges, the right of the latter to recovery is defeated. It does not controvert the matter alleged by the plaintiff, but on the contrary it expressly or impliedly admits plaintiff's right to recover upon what he alleges. It admits that the plaintiff once had a good cause of action, but insists that because of new facts, something that has occurred since the facts alleged by plaintiff, his cause of action no longer exists.¹

It is therefore deemed necessary under the code that new matter must give color, that is, it must admit an apparent right in the plaintiff. There is no particular form for the admission, as it will be implied from the nature of the new matter.²

Admissions are generally made of those matters which defendant concedes to be true. A form of allegation is sometimes like this. A general admission is made of all matters which defendant can admit, and then a denial of each and every other allegation not herein admitted or controverted is made. This is in effect a general denial, and has been criticised as such but has been held good.³

The general rule of pleading is that defenses which assume or admit the original cause of action alleged, but based on subsequent facts or transactions which go to qualify or defeat it must

bility but for such facts; hence the term 'new matter in confession and avoidance,' so generally applied to special defenses." There is no confession in terms, only an implied one from the nature of the defense. *Morgan v. Ins. Co.*, 37 Iowa, 359.

See *Corrigan v. Rockefeller*, 5 Ohio, N. P. 338. ("The 'new matter' in the code of Civil Procedure, sec. 5070, includes matter in confession and avoidance, and involves matter extrinsic to the matter set up in plaintiff's petition.")

"A plea by way of confession and avoidance admitted that the cause of action alleged did once exist, and averred subsequent facts which operated to discharge and satisfy it. The new matter under the code ad-

mits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery." *Pom. Code Rem.*, sec. 673. See *Id.* 672.

¹*Corrigan v. Rockefeller*, 5 Oh. N. P. 838; *Pomeroy's Code Rem.*, sec. 691; *Morgan v. Ins. Co.*, 37 Iowa, 359; *Frisch v. Caler*, 21 Cal. 71; *Manning v. Winter*, 7 Hun, 482; *Anson v. Dwight*, 18 Iowa, 241; *Gilbert v. Cram*, 12 How. Pr. 455; *Piercy v. Sabin*, 10 Cal. 22; *Glazer v. Clift*, 10 Cal. 303.

²*Morgan v. Ins. Co.*, 37 Iowa, 359.

³*Griffin v. L. I. R. R. Co.*, 101 N. Y. 348. See *Clark v. Dillon*, 97 N. Y. 370.

be pleaded and proved by the defendant. And the cause alleged by the plaintiff must be proved by him.¹

Sec. 75. New matter continued—General rules.—The same rules as to statement of facts, conditions, conclusions of law, as shown in the chapter on the petition, are applicable to the answer.² In view of the fact, therefore, that these general rules are found at the place indicated, and that the answers in the particular actions are discussed in subsequent chapters, there is little left relating solely to the answer to be noticed here. A demurrer should not be sustained to an answer which contains facts sufficient to defeat the plaintiff's right of recovery, merely because the material facts are unskillfully arranged or stated.³ Allegations of new matter without merit should be stricken out as irrelevant,⁴ and purely technical defenses should be scrutinized.⁵ It is not essential that the new matter alleged be a defense to the whole or to a single paragraph of a petition, but is good to the extent alleged.⁶ According to some precedent, an answer which is pleaded in bar to the whole of a cause of action, which is in fact only a partial defense, is subject to a demurrer,⁷ but this is not universal.⁸ And so with an answer stating only such facts as constitute a bar neither to the whole nor to any part of the plaintiff's action.⁹ If the defense merely disproves the plaintiff's statement, then it is not new matter, and is admissible under the general denial; if, on the contrary, the statement of plaintiff is not denied, the facts constituting the defense is new matter, as confession and avoidance, and must be set forth. Facts which show payment,¹⁰ want of consideration,¹¹ or a usurious contract,¹² or a bar by statute of limitations,¹³ release, accord and satisfaction, are illustrative of what constitutes new matter. An answer

¹ *Farmers Loan & Trust Co. v. Seifke*, 144 N. Y. 354; *Whitlatch v. F. & C. Co.*, 149 N. Y. 45, 50.

² See ch. 5.

³ *Sterling Wrench Co. v. Amstutz*, 50 O. S. 484.

⁴ *Ridenour v. Mayo*, 29 O. S. 138.

⁵ *Fox v. Althorp*, 40 O. S. 322.

⁶ *Swan's P. & P.*, p. 256.

⁷ *Ponder v. Tate*, 76 Ind. 1; *Falmouth, etc., Co. v. Shawhan*, 107 Ind. 47; *Shortle v. Railroad Co.*, 131 Ind. 338; 30 N. E. Rep. 1084 (1892).

⁸ See sec. 74-2, *ante*.

⁹ *Gill v. Sells*, 17 O. S. 195. But

see *Peebles v. Isaminger*, 18 O. S. 490.

¹⁰ *Quin v. Lloyd*, 41 N. Y. 349; *McKyring v. Bull*, 16 N. Y. 297.

¹¹ *Chamberlain v. Railroad Co.*, 15 O. S. 225; *Louderman v. Judy*, 2 O. C. C. 351. Illegality of consideration is the same as want of consideration. *Matthews v. Leaman*, 24 O. S. 615.

¹² *Anglo A. L. M., etc., Co. v. Brohman*, 33 Neb. 409; *Morford v. Davis*, 28 N. Y. 481.

¹³ *Towsley v. Moore*, 30 O. S. 184. See sec. 1147, *post*.

setting up a different contract from that sued on is regarded only as a denial.¹ A defendant may be entitled to admissions in a petition to sustain his answer against a general demurrer,² and admissions in a former answer may be given in evidence.³ An answer to a petition by a widow for dower merely denying the right thereto is not admissible under the code.⁴ A repetition of a general or special denial may be stricken out on motion.⁵

Sec. 75-1. Payment when new matter.—Various opinions have been expressed by courts and writers as to whether or not payment is new matter which must be pleaded in order to justify evidence showing it. There have been too many loose expressions in regard to the matter.

An attempt will be made to state what seems to the author to be the true rule upon principle, as well as the conclusion deduced from the authorities.

Whether payment is new matter or may be admitted under a general denial depends upon two things: (1) The form of the allegations by the plaintiff, and (2) upon the nature of the denial. Some courts seem to have proceeded upon the theory that payment is new matter in all cases, and seem to lose sight of the fact that a general denial controverts the statement of every fact made by the plaintiff which is necessary to be proven to maintain his cause of action.

Whether payment is new matter to be alleged, or whether it can be admitted under a general denial depends entirely upon the form of the allegation by the plaintiff. The plaintiff may so frame his averments as to make the fact of *non-payment* one of the facts which he must prove to make his case, in which event a general denial controverts payment, it is not then new matter, but evidence by the defendant that it is paid is admissible under the denial. It would be difficult to frame any rule more definite than this, as the matter must depend entirely upon the form of plaintiff's allegations in each case.

On the other hand, if the allegations by plaintiff are so framed that they do not make the fact of non-payment a material fact which he must prove to maintain his cause of action, then payment is new matter which must be specially pleaded by the defendant before he can introduce evidence showing it.

¹ Fieldelley v. Reis, 12 W. L. B. 77.

² Gebhart v. Sorrels, 9 O. S. 461; Erwin v. Shaffer, 9 O. S. 43; Insurance Co. v. McGookey, 33 O. S. 555.

³ Peckham Iron Co. v. Harper, 41 O. S. 100.

⁴ Finch v. Finch, 10 O. S. 501.

⁵ Campen v. Murray, 3 O. C. C. 93.

It may be difficult to apply these rules and to determine from the form of the allegation whether non-payment is made a material fact by plaintiff, as the averments are so varied.

In support of what we shall call the general and well-supported rule, that when the plaintiff so frames his allegations as to make the fact of non-payment a necessary and material one, which he must prove in the first instance, a general denial will raise the issue of payment under which the defendant may introduce evidence of payment, the following authorities are collected in the note.¹ Some of these authorities hold that an allegation by plaintiff that a specific sum is due,² or an averment of indebtedness only generally;³ or where a note is declared upon, where it is alleged that there was due upon it a certain sum;⁴ or where suit is brought for a balance due,⁵ make payment a material fact, so that a general denial will controvert it and form an issue, and that plaintiff must prove the fact that there has been no payment.

What appears to be an entirely reliable general rule as to when a general denial will raise the issue of payment and when payment is new matter has been stated, and some of the principal authorities have been collected, and we have also given some of the forms of allegations which the authorities have held to be controverted by a general denial, raising the issue of payment.

It is my purpose now to illustrate how the two general rules which have been given may be applied practically, and to show wherein the error or inconsistency is in the cases. The trouble with many of the cases is, that they merely hold that payment is new matter, without drawing the proper distinctions and giving reasons. The study and practice of the law would be made much easier if courts would do a little reasoning in their opinions.

A general denial, it is said, controverts those facts which plaintiff must prove to maintain his cause. The inquiry in every case, therefore, is what plaintiff must prove.

¹ Knapp v. Roche, 94 N. Y. 329; Hun v. Van Dyck, 26 Hun, 567; 92 N. Y. 660; Brown v. Orr, 29 Cal. 120; Wetmore v. San Francisco, 144 Cal. 300 (on the theory that the denial makes it necessary to prove an indebtedness); Frisch v. Caler, 21 Cal. 71; Davany v. Eggenhoff, 43 Cal. 395 (where the petition alleged that a certain sum was due); Morley v.

Smith, 4 Kan. 183; Fairchild v. Amsbaugh, 22 Cal. 572, 574; Brooks v. Chilton, 6 Cal. 640.

² Wetmore v. San Francisco, *supra*.

³ Morley v. Smith, *supra*; Knapp v. Roche, 94 N. Y. 329; Seymour v. Shea, 62 Iowa, 708.

⁴ Frisch v. Caler, 21 Cal. 71.

⁵ Quin v. Lloyd, 41 N. Y. 349; White v. Smith, 46 N. Y. 418.

An action is brought upon an account or a note in the short form. A general denial is filed. The form of the allegation by plaintiff is: There is due plaintiff from the defendant the sum of \$—— upon an account or note, etc., which he claims and for which he asks judgment. In such case plaintiff must prove that the account was made or that the items thereof are correct, or that the note was executed and delivered, and the burden of proving payment is upon the defendant. This must be the theory upon which those cases holding payment to be a defense base their conclusion. Some cases and excerpts therefrom supporting this statement are found in the note.¹

¹ *Fewster v. Goddard*, 25 O. S. 276. (Was an action on a note; plaintiff set forth a copy alleging that the whole amount was due. Defendant answered, denying that anything was due on the note, and alleged that he had paid it in full. No reply was filed to this answer. The case, without further pleading, was tried by a jury, and on the trial the court ruled that the plaintiff had the right to open and close. The plaintiff gave the note in evidence, and rested his case. The defendant then gave evidence tending to prove payment of the note, and rested. The Supreme Court held: "In an action upon a promissory note, alleging that there is a specified amount due thereon, from the defendant to the plaintiff, an answer by the defendant, alleging payment of the note in full, is an answer setting up new matter, and must be taken as true in the absence of any reply thereto.")

Culvertson Irrigating and Water Power Co. v. Cox, 73 N. W. Rep. 9 (Neb., 1897). Cox sued the irrigation company for a balance due him on a contract for labor performed by him in constructing a ditch for said irrigating company. For a defense, the irrigating company alleged that it had paid Cox for all labor performed by him under the contract sued on. There was no reply to this answer.

Ragan, J., said: "Payment is a matter of defense, which, to be available, the defendant is required to set up in his answer. *Live Stock Co. v. May*, 51 Neb. 474, 71 N. W. 67. In *Sharpless v. Giffen*, 47 Neb. 146, 66 N. W. 285, it was held that, in an action on a promissory note, want of consideration was new matter, which must be specially pleaded, and was not available as a defense under a general denial. We think, therefore, that, when a petition declares for money due upon a contract, an allegation of payment is a material one, and the defense of payment is new matter, within the meaning of section 134 of the Code of Civil Procedure. Section 135 of the Code defines a material allegation as one essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient."

Where a note was made for the amount of an unpaid subscription to the capital stock of a corporation, the payment of such note to be available must be pleaded and proved by the party relying upon such payment. *Wyman v. Williams*, 73 N. W. Rep. 285 (Neb., 1897).

Under a special plea of payment of the note of a co-partnership to a bank by the deposit of money, which the bank received and accepted in payment, evidence that

There is, after all, too much nicety about the controversy. There is hardly any case where, inferentially at least, the question of payment does not arise, and some kind of proof is offered by plaintiff, as an account or note showing no payments on their face.

But whenever there is any controversy about a question of payment, there are collateral facts connected with it, which do not concern plaintiff in the first instance so far as concerns his allegations and proof; the facts and circumstances really constitute new matter rendering it more logical to so treat it. To require plaintiff in such instances to make any allegation as to non-payment would violate another rule that he shall not anticipate a defense.¹ For instance, payment by way of a sale or transfer of goods, or where payment is made by the debtor, to an agent or factor, or where a note,² or a check,³ or that a draft payable at a future day has been taken as payment.⁴

The manner in which payment shall be alleged will of necessity depend upon the facts. If goods or services rendered constitutes the payment, this must be set up, with the averment that they were taken as payment.⁵ In many cases a general allegation of payment will be sufficient.⁶

Sec. 75-2. Contributory negligence when new matter.

—Whether or not facts showing that plaintiff was guilty of con-

the bank accepted in payment the individual note of one of the members of the firm is inadmissible.

Bank v. Strait, 73 N. W. Rep. 645 (Minn., 1898). (Mitchell, J., in this case said: "It is urged that the allegation of non-payment in the complaint and the general denial in the answer formed a complete issue on the question of payment, irrespective of the special plea. There are some cases which seem to so hold, but such a rule is both illogical and contrary to the spirit and purpose of the code system of pleading. Payment is a matter of defense, and the allegation of non-payment in the complaint was unnecessary. A denial, either general or special, puts in issue only the material allegations of the complaint; that is, those which the

plaintiff is required to prove in order to establish his cause of action. Moreover, we think that, under any view of the law, the general denial must be held to be limited and qualified by the facts alleged in the special plea.")

"Defendant can not prove payment under answer denying any payment as well as liability on the note." *Eldridge v. Husted*, 49 N. Y. S. 1019 (City Ct. N. Y., 1898).

¹ *Ante*, sec. 65-2. *Wilkins v. Moore*, 20 Kan. 538, although this is questioned. *Phillips Pl.*, sec. 349.

² *Hoogland v. Wight*, 7 Bosw. 394.

³ *Bradford v. Fox*, 16 Abb. Pr. 51.

⁴ *Albany Ins. Co. v. Devendorf*, 43 Barb. 444.

⁵ *Corbett v. Hughes*, 75 Iowa, 281.

⁶ *Johnson v. Breedlove*, 104 Ind. 521. See *Maxwell Plg.* 497.

tributory negligence barring recovery, is new matter to be pleaded, or whether evidence in proof thereof may be shown under a general denial, depends upon one or two considerations. There ought not to be much controversy over the question, although there has been considerable. In ten states it is held that plaintiff must prove freedom from contributory negligence, and of course he must allege that he was without fault, and under such a rule, that being one of the facts which the plaintiff must allege and prove, facts showing contributory negligence are not new matter but may be shown under a denial.¹ In thirty-two other states the burden of proving contributory negligence rests upon the defendant, who must plead and prove contributory negligence on the part of the plaintiff.²

It was stated in substance in the first edition of this work,³ and there seems to be no good reason to recede therefrom, as it appears to be well supported and logically correct, that the plaintiff need not allege freedom from contributory negligence, because it is matter of defense to be specially pleaded, but that the rule is confined to cases where the relation of the parties do not require or impose any duty upon the person injured toward the one causing the injury, except to use ordinary care to avoid the injury. The exercise of ordinary care is presumed, and need not, as a general rule, be affirmatively alleged.⁴ But there are certain relations in which parties may be placed, requiring certain knowledge, obligations of duty, or the assumption of certain risks, so that this ordinary rule of presumption which we have spoken of can not follow them. Again, parties complaining may, by the facts which they allege, place themselves in such a position as will demand of them an exercise of a certain amount of care out of the ordinary, so that from their own statement there may be an inference of negligence on their part which they must negative and disprove. It is believed, therefore, that in all actions by a servant against his master, or an agent against his principal, or where the statement by one outside of these relationships raises an inference of contributory negligence, the plaintiff must allege and prove that he was without fault. In such cases, therefore, contributory negligence may be shown under a denial. In all other cases it is new matter to be alleged. This seems the logical solution of the question, and as we shall now show is supported by authority. The *Mad River and Lake Erie R. R. Co. v Barber* (5 O. S. 641) is a leading case. It was an action by a conductor

¹ *Sherman and Redfield Neg.*, sec. 107.

³ Sec. 915, *post*.

⁴ Sec. 915, *post*, and cases.

² *S. & R. on Neg.*, sec. 108, 113.

against a railroad company for an injury resulting from the insufficiency of cars, or defects of machinery. "In such action (the Court hold) the plaintiff, in order to lay a sufficient foundation for a recovery and judgment, must aver or show in his petition, in addition to the allegation that he had not a knowledge of the insufficiency or defects which were the alleged cause of the injury, that he exercised due care and diligence in the use and examination or inspection of the cars, etc. It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular, the conductor of a train has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time, without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect, as to himself, etc."

"If the plaintiff in the averments of his petition necessary to state his cause of action, by reason of his relation to the defendant as agent, employe or otherwise, suggests the implication of negligence on his part, that implication must be negatived by an allegation that he was without fault."¹ So where the "circumstances and character of the injury complained of * * * are such as necessarily devolve carefulness upon the plaintiff, and the evidence given by him (or the allegations in the first instance) disclose a case which fairly puts in question the due exercise of care on his part," this rule of presumption can not apply, for the plaintiff is "exposed to a suspicion of negligence."² So in other cases than those of employes or agents where the facts alleged raise a presumption of negligence on the part of the plaintiff, he must negative that presumption.³ We arrive at the conclusion, therefore, that in all cases wherein we have shown it to be necessary for the plaintiff to allege and prove want of contributory negligence, facts showing contributory negligence are not new matter, but may be shown under a denial. In cases where it is not so necessary for the plaintiff to aver want of contributory negligence, then it is new matter and must be pleaded.⁴

Sec. 76. Joint answer.—An answer by one of several defendants sued jointly, setting up a defense common to all, will inure to the benefit of all.⁵

¹ *Street R. R. Co. v. Nolthenius*, 40 O. S. 380 (a leading case).

² *Robinson v. Gary*, 28 O. S. 250; *B. & O. R. R. Co. v. Whitaker*, 35 O. S. 627.

³ *Street R. R. Co. v. Nolthenius*, 40 O. S. 380, and cases cited.

⁴ See *Magee v. Railroad Co.*, 78 Cal. 430; 12 Am. St. 69 and note.

⁵ *Miller v. Longacre*, 26 O. S. 291; *Slevin v. Reynolds*, 1 Handy, 37; *Sprague v. Childs*, 1st O. S. 107.

Sec. 77. Answer of guardian and attorney.—A guardian of an infant, or of a person of unsound mind, or an attorney for a person in prison, shall deny in the answer all material allegations of the petition prejudicial to such defendant:¹ The guardian must bring the rights of his ward properly before the court by a denial or otherwise.² An answer alleging ignorance of the matters in the petition, praying to have the rights of the infant protected, is in effect a general denial.³ And even though a guardian does not expressly deny the allegations made by plaintiff, a judgment will not be disturbed if it appears from the record that the court treated it as a denial.⁴

Sec. 78. Several defenses.—A defendant is permitted under the code to set up as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he may have, so long as they are consistent with each other; those not set up are waived.⁵ There is no provision requiring the defenses to be technically consistent with each other, except that they must be verified, and two inconsistent defenses can not be verified.⁶ In New York a defendant may set up as many defenses as he may have, whether consistent or not.⁷

It is not consistent with the spirit and intention of the code that a party having two good defenses, and not knowing which of the two in fact or in law is his true one, shall, at his peril, be compelled to elect in advance on which he will rely, to the exclusion of the other. When from the nature of the case it is uncertain which of the two grounds of defense is the proper one, it is competent to set them both up if the answer can be sworn to without falsifying the one or the other.⁸ In a suit upon a note the defendant may deny its execution, or, if the signature to the note is genuine, that it was fraudulently obtained;⁹ or the defendant may deny its execution and also claim that there

¹ O. Code, sec. 5078.

² Long v. Mulford, 17 O. S. 484.

³ Wood v. Butler, 23 O. S. 520.

⁴ Randall v. Turner, 17 O. S. 262.

⁵ O. Code, sec. 5071; Bank v. Closson, 29 O. S. 81; Witte v. Lockwood, 39 O. S. 141 and cases cited; McKinster v. Hitchcock, 19 Neb. 105. See *ante*, sec. 21; Pavey v. Pavey 30 O. S. 600; Richardson v. Bates, 8 O. S. 264; Judy v. Louderman, 48 O. S. 572. A defense is not necessarily waived by

setting up other defenses inconsistent therewith. Insurance Co. v. Frick, 29 O. S. 466.

⁶ Bank v. Closson, 29 O. S. 78.

⁷ Society Italiana v. Sulzer, 138 N. Y. 468; Bruce v. Burr, 67 N. Y. 237; Goodwin v. Wertheimer, 99 N. Y. 149.

⁸ O. Code, sec. 5071; Bank v. Closson, 29 O. S. 81.

⁹ Bank v. Closson, 29 O. S. 78.

was no consideration therefor;¹ or he may aver want of consideration in that it was made upon false representations, and also ask recoupment of damages.² In an action of ejectment a plea of not guilty and a disclaimer are inconsistent, the former being an admission of possession, putting the question of title in issue, while the latter admits title but denies possession.³ Each defense must be complete in itself,⁴ although to avoid repetition, allegations in one defense or count may be incorporated into another by proper reference.⁵ Two or more defenses must be separately stated and numbered as is required in two or more causes of action,⁶ though it will be a sufficient compliance with the rule if separated into paragraphs and not numbered.⁷

Sec. 79. Answer and cross-petition.—When a defendant demands affirmative relief, the pleading filed by him is termed an answer and cross-petition.⁸ A defendant may admit the claim set up in the petition, and join in the relief there sought by way of cross-petition. Only those allegations controverted should be denied. Hence, to enable a defendant to claim relief by way of cross-petition, it is not essential that he deny the allegations of the petition.⁹ An answer will be treated as a cross-petition, and the proper relief granted, though not so denominated, if the necessary facts to warrant the same are set forth.¹⁰ Only such relief can be prayed for as relates to the matters contained in the petition;¹¹ so that a defendant can not bring in a controversy with a third person not connected with the case,¹² but may against other defendants in the same petition.¹³ The real party in interest may intervene by way of cross-petition as against an apparent party or owner, and obtain the necessary relief.¹⁴ The plaintiff in the case becomes a defendant to

¹ *Pavey v. Pavey*, 30 O. S. 600. See *Nelson v. Brodhack*, 44 Mo. 596; *Bell v. Brown*, 22 Cal. 671; *Hopper v. Hopper*, 11 Paige, 46; *Springer v. Dwyer*, 50 N. Y. 19; *Buhler v. Wentworth*, 17 Barb. 649; *Mott v. Burnett*, 2 E. D. Smith, 50; *Weston v. Lumley*, 33 Ind. 486; *Derby v. Gallup*, 5 Minn. 119. *Contra*, *Barnes v. Scott*, 11 S. Rep. 48 (Fla., 1892).

² *Springer v. Dwyer*, 50 N. Y. 19.

³ *Torrey v. Forbes*, 94 Ala. 135; 10 S. Rep. 320 (1891).

⁴ *Reid v. Huston*, 55 Ind. 173; *Bank v. Green*, 33 Ia. 140

⁵ See sec. 20, *ante*; *Hammond v. Earle*, 58 How. Pr. 426.

⁶ See *ante*, sec. 20; O. Code, sec. 5071.

⁷ *Mundy v. Wight*, 26 Kan. 173.

⁸ O. Code, sec. 5059.

⁹ *Bradford v. Andrews*, 20 O. S. 208.

¹⁰ *Klonne v. Bradstreet*, 7 O. S. 322.

¹¹ O. Code, sec. 5071; *Brown v. Kuhn*, 40 O. S. 485.

¹² *Bartlett v. Patterson*, 10 W. L. B. 367.

¹³ O. Code, sec. 5071.

¹⁴ *Osborn v. McClelland*, 43 O. S. 284.

the cross-petition, and is entitled to the same period in which to reply as is allowed a defendant, to wit, the third Saturday after the cross-petition is filed.¹ It is not necessary to issue a summons for a person already in court upon the filing of a cross-petition.² But the rule is otherwise where a personal judgment is sought by way of cross-petition when the defendant filing the same is in default for answer. Summons is necessary in such cases.³ The code of civil procedure proceeds upon liberal principles in the administration of justice. Its provisions taken together demonstrate a purpose to broaden the practice so as to furnish relief in accordance with the principles of equity embraced in the combined system. In the equitable system the claims and rights of all parties before it respecting the subject-matter of an action were adjusted and settled in one action so far as possible. This is the purpose of the provisions of the code considered in this section.⁴ There is nothing in the code, when considered as an entirety, that narrows the former power of a court of equity to fully adjudicate every question legitimately arising between the parties before it respecting the subject of the action. A defendant in an action seeking a distribution of the assets of an insolvent corporation may file an answer and cross-petition disclosing assets of the corporation in addition to those set forth in the petition, and join a cause of action for money due by a stockholder to the corporation, with a cause of action against all of the stockholders for their stockholders' liability. In an action in which a receiver is appointed to wind up the affairs of a corporation, a defendant may by cross-petition seek the enforcement of the statutory liability of the stockholders.⁵

Sec. 79-1. Cross-petition against co-defendant.—The code permits a defendant to demand affirmative relief touching the matters in question against the plaintiff, or against other defendants in the same action.⁶ But the cause of action which one defendant may set up against his co-defendant must be one arising out of, or having some reference to, the subject of the original action.⁷

¹ Kummel v. Pratt, 40 O. S. 344.

⁴ R. S. secs. 5071, 5311.

² Brown v. Kuhn, 40 O. S. 485.
Not necessary in divorce proceedings. Young v. Young, 9 W. L. B. 24.

⁵ Peter v. F. F. & M. Co., 53 O. S. 534.

⁶ O. Code, sec. 5071.

⁷ Bank v. Davidson, 72 N. W. Rep. 129 (Minn., 1897). Bliss Plg., sec. 390; Brown v. Kuhn, 40 O. S. 485.

³ Thatcher v. Dickinson, 3 O. C. C. 144.

Sec. 79-2. Cross-petition must be complete in itself.—

A cross-petition must be governed by the same principles of law and rules of practice as is the petition by plaintiff. When a defendant files a cross-petition seeking affirmative relief, he becomes the plaintiff as to the matter therein contained, and the plaintiff in the action becomes the defendant in the cross-petition.¹ It must, therefore, like the petition of plaintiff, state facts sufficient to entitle the defendant to some affirmative relief, and it can not, according to some authority, refer to, rely upon, or be aided by the allegations of the petition or other facts for a part of the facts necessary to constitute a cause of action.² But in Ohio it is held that a defendant may adopt in his answer and cross-petition such averments from the petition in the case as he chooses without repeating them, and when he does so adopt them, they are to be deemed a part of his cross-petition, entitling him to the same relief as if he had re-stated them; and that after the filing of such cross-petition the plaintiff can not dismiss the action as to such defendant without the latter's consent, but that the defendant may in such case proceed in the action in all respects as if he was the plaintiff therein.³

Sec. 80. Counter-claim—Defined—Nature of.—We have seen that the new matter which a defendant may set up in his answer may consist of matter constituting a counter-claim;⁴ and that a defendant may set up as many defenses as he may have, whether made up of new matter, counter-claim or set-off,⁵ and claim such relief touching the matters in question in the petition against the plaintiff.⁶ He may state facts which may be both a defense and a counter-claim, in which case the two should be stated separately and numbered.⁷ A counter-claim which a defendant is permitted under the code to set up by way of defense must be a complete, independent cause of action, legal or equitable, other than set-off, existing in favor of a defendant against a plaintiff, between whom a several judgment might be had in the action,⁸ or one of which the court in which the action is pending would have jurisdiction in a separate case.⁹ Before final sub-

¹ *Ewing v. Patterson*, 35 Ind. 326.

⁵ *Ante*, sec. 78; O. Code, sec. 5071.

² *Campbell v. Routt*, 42 Ind. 410; *Conger v. Miller*, 104 Ind. 592; *Masters v. Beckett*, 83 Ind. 595; *Leach v. Rains*, 48 N. W. Rep. 658 (Ind., 1897).

⁶ O. Code, sec. 5071.

⁷ *Lancaster, etc., Mfg. Co. v. Colgate*, 12 O. S. 344.

³ *Brinkerhoff v. Smith*, 57 O. S. 610.

⁸ O. Code, sec. 5072; *Hall v. Butler*, 6 O. S. 207; *Mogle v. Black*, 5 O. C. C. 52.

⁹ *Cregin v. Lovell*, 88 N. Y. 258.

⁴ *Ante*, sec. 75; O. Code, sec. 5071.

mission of the cause the court may upon motion allow the counter-claim to be withdrawn, and the same may become the subject of another action.¹ If an independent action has already been instituted thereon, the court may refuse to consider it.² It must arise out of the contract or transaction set forth in the petition, or be connected with the subject of the action.³ It must have some direct connection with the transaction sued on.⁴ The words "subject of the action" are construed to mean the questions in dispute between plaintiff and defendant, or the facts constituting plaintiff's cause of action.⁵ It is synonymous with the term "cause of action."⁶

Sec. 81. Counter-claim—How pleaded.—An answer setting up a counter-claim must contain facts which constitute a cause of action in itself, in such a manner as to entitle the defendant to a judgment or decree in a separate action,⁷ and with the same distinctness and certainty as if in a petition.⁸ The usual way is to designate it as a counter-claim and ask for affirmative relief.⁹ The same rules of pleading are applicable as in stating any cause of action. A defect in a counter-claim must be reached by a demurrer or motion to make definite and certain.¹⁰ If it appears that other new parties are necessary to a final decision upon a counter-claim, they may be made by permission of court, or the counter-claim may be dismissed and made the subject of a separate action.¹¹

Sec. 82. Counter-claim—When may be set up—Judicial expositions.—As against a note for goods sold, a defendant may set up, by way of counter-claim, a breach of contract of sale or fraudulent representations,¹² or failure of consideration.¹³ If delivery of goods and payment appear to have been concurrent conditions, the answer will be ineffectual as showing a counter-claim unless it avers an offer or readiness to pay.¹⁴ An overpayment of a note may be set up as a counter-claim against an action

¹ O. Code, sec. 5089.

² *Becroft v. Dossman*, 2 W. L. B. 110.

³ O. Code, sec. 5072.

⁴ *Brothers v. Mason*, 2 C. S. C. R. 66; *Roots v. Nye*, 2 Handy, 229. See *Evans v. Hall*, 1 Handy, 434-7; *Marthens v. Dudley*, 1 W. L. B. 302.

⁵ *Chamboret v. Same*, 41 How. Pr. 125. See *Bliss' Code Pldg.*, sec. 373.

⁶ *Borst v. Corey*, 15 N. Y. 509.

⁷ *Hill v. Butler*, 6 O. S. 207; *Cregin v. Lovell*, 88 N. Y. 258.

⁸ *Dale v. Hunneman*, 12 Neb. 221-5.

⁹ *Bliss' Code Pldg.*, sec. 367; *Bates v. Rosekrans*, 37 N. Y. 409.

¹⁰ *Fittretch v. McKay*, 47 N. Y. 426.

¹¹ O. Code, sec. 5074.

¹² *Timmons v. Dunn*, 4 O. S. 681; *Upton v. Julian*, 7 O. S. 95.

¹³ *Holzworth v. Koch*, 26 O. S. 33.

¹⁴ *Chambers v. Frazier*, 29 O. S. 362.

thereon.¹ A creditor of a mortgagor of personalty may be made a party defendant to an action by the mortgagee and enforce his right to relief by way of counter-claim.² As against a foreclosure of a mortgage the mortgagor may set up a claim for damages arising from fraud of the mortgagee in selling the premises to the mortgagor;³ or in case of a sale of business and good-will as against a mortgage securing the purchase-money, he may set up a breach of contract;⁴ or the mortgagor may set up a counter-claim for damages for misrepresentations as to the premises,⁵ or for an unpaid assessment due at the date of sale.⁶ A tenant may claim damages for a breach of a lease in an action by the lessor for rent,⁷ but not wrongful acts of landlord, as trespass or negligence,⁸ or that the premises were rendered uninhabitable by reason of noise.⁹ Damages for failure on the part of the landlord to build a fence according to contract,¹⁰ or breach of covenant to make repairs,¹¹ may be set up as a counter-claim against rent. A vendee may set up as a counter-claim against the vendor of realty a claim for damages sustained by reason of false representations,¹² or for any breach of covenants of warranty,¹³ though a defect in title is not available as a counter-claim as against purchase-money, unless there has been an eviction.¹⁴ An incumbrance may be set up even against a transferee of a note without indorsement.¹⁵ As against an action for the purchase price of goods sold, a defendant may claim damages arising from fraud or breach of warranty,¹⁶ as for a defect of quality or quantity.¹⁷ In an action to recover damages for a tort the defendant may counter-claim for damages for a tort committed by plaintiff arising out of or connected with the cause of action set forth in the petition.¹⁸

Sec. 83. Trial on counter-claim.—A defendant who has properly set up a counter-claim has the right to have the same

¹ *West v. Meddock*, 16 O. S. 418.

² *Morgan v. Spangler*, 20 O. S. 38.

³ *Allen v. Shackleton*, 15 O. S. 145.

⁴ *Burckhardt v. Burckhardt*, 36 O. S. 261.

⁵ *Pierce v. Tierch*, 40 O. S. 168.

⁶ *Craig v. Heis*, 30 O. S. 550.

⁷ *Cook v. Soule*, 56 N. Y. 420; *Black v. Ebner*, 54 Ind. 544; *Meyer . Burns*, 35 N. Y. 269.

⁸ *Edgerton v. Page*, 20 N. Y. 281.

⁹ *Boreel v. Lawton*, 90 N. Y. 293.

¹⁰ *Hay v. Short*, 49 Mo. 139.

¹¹ *Cook v. Soule*, 45 How. Pr. 340; *Block v. Ebner*, 54 Ind. 544

¹² *Mulvey v. King*, 39 O. S. 491.

¹³ *Gest v. Kenner*, 2 Handy, 86.

¹⁴ *Picket v. Picket*, 6 O. S. 525. See chapter on Deeds, sec. 477.

¹⁵ *Kyle v. Thompson*, 11 O. S. 616.

¹⁶ *Dounce v. Dow*, 57 N. Y. 16; *Dayton v. Hooglund*, 39 O. S. 671; *Upton v. Julian*, 7 O. S. 95; *Moore v. Woodside*, 26 O. S. 537.

¹⁷ *Moore v. Woodside*, 26 O. S. 537.

¹⁸ *Mogle v. Black*, 5 O. C. C. 51; *Swan's Pl. and Pr.*, 259 n. a; *Barholt v. Wright*, 45 O. S. 181.

tried, even though the plaintiff may have dismissed his action or failed to appear.¹ This right only exists, however, where the allegations in the answer are such as entitle the defendant to affirmative relief.² But a plaintiff in such case can not dismiss the action so as to defeat the right of the defendant to have his counter-claim so tried.³ And where the counter-claim, being within the original jurisdiction of the court, is tried without objection, the plaintiff is considered to have waived his right to raise the question whether the cross-demand is a proper subject of counter-claim.⁴

Sec. 84. Set-off.—Falling under the head of new matter which a defendant is permitted to set up as a defense is set-off, which may be defined as a cross-demand not arising out of the transaction set forth in the petition, nor connected with the subject of the action. It must be a cause of action arising upon contract, and can be pleaded only in an action founded on contract.⁵ The right of set-off is purely statutory,⁶ and under some codes it is embraced in counter-claims.⁷ It exists only when there is a cross-demand between the same parties at the same time, and on which an action might be maintained at the same time by either party.⁸ It may be claimed against an equitable owner of the demand in suit,⁹ and is governed by the law of the place where the action is brought.¹⁰ The intention of the code was to preserve the right of set-off as against an assignment of a demand,¹¹ so that a party may recover a set-off by virtue of an assignment.¹² But this is not true of an assignment of a non-negotiable contract before due.¹³ It may also be asserted as against a receiver of an insolvent corporation.¹⁴ If a new party be necessary to a final decision upon a set-off, such new party may be brought in.¹⁵

Sec. 85. What subject of set-off.—In an answer founded on contract a defendant may claim as set-off any cause of action he may have against the plaintiff, arising upon contract, whether

¹ R. S., sec. 5315.

² *Bank v. Weyand*, 30 O. S. 126.

³ *Wiswell v. Church*, 14 O. S. 31.

⁴ *Fitzgerald v. Cross*, 30 O. S. 444.

See *Ashley v. Marshall*, 29 N. Y. 494;

Vann v. Rouse, 94 N. Y. 401.

⁵ O. Code, sec. 5075; *Swan's Pldg.*, p. 263; *Ernst v. Kunkle*, 5 O. S. 521.

⁶ *Ross v. Johnson*, 1 Handy, 388.

⁷ *Boone's Pldg.*, sec. 85.

⁸ *Whims v. Grove*, 1 O. C. C. 98;

Ross v. Johnson, 1 Handy, 388. Damages against assignee must exist at the time. *Heister v. Ins. Co.*, 6 Am. L. Rec. 238.

⁹ *Miller v. Florer*, 15 O. S. 148.

¹⁰ *Bank v. Hemingray*, 31 O. S. 168.

¹¹ *Ross v. Johnson*, 1 Handy, 388.

¹² O. Code, sec. 4993.

¹³ *Fuller v. Steiglitz*, 27 O. S. 355.

¹⁴ *Hade v. McVay*, 31 O. S. 231.

¹⁵ O. Code, sec. 5076.

it be a liquidated demand or for unliquidated damages.¹ Ordinarily, separate and joint claims can not be set off against each other, but a natural equity in favor of such set-off will be protected.² And in an action on a separate note a defendant may set off an overdue joint note made by plaintiff and another where both are insolvent.³ A set-off may be pleaded against an administrator if against the estate,⁴ but not by one who has property belonging to the estate when sued therefor.⁵ A defendant may claim as a set-off an individual claim against a surviving partner to whom an account has been assigned by his partner;⁶ and so with a debt due from a firm as against a suit by a surviving partner on a partnership contract.⁷ But where only one member of a firm is served in a suit against a firm, a claim held by him individually can not be set off against the plaintiff.⁸ A stockholder can not offset a sum of money by him paid on a judgment rendered against the corporation against a note given by him for stock.⁹ An indorser of a note can not set off his liability against the maker,¹⁰ nor is a note assigned after maturity the subject of set-off against the assignor.¹¹ In an action on a joint debt against principal and surety a demand due from plaintiff to the principal may be set off.¹² A claim on which the original action was founded can not be set off in an action on a restitution bond,¹³ nor can a mayor set off unpaid costs appearing on his docket against an action for fines by him collected.¹⁴ A claim to be allowed as a set-off must be one which belonged to the defendant at the time of the commencement of the action in which

¹ Needham v. Pratt, 40 O. S. 186; R. S., sec. 5075; Stevens v. Able, 15 Kan. 584; Fuller v. Steiglitz, 27 O. S. 355; Doppler v. Cox, 10 Am. Law Rec. 306. Cf. McCulloch v. Lewis, 1 Disn. 564; Evens v. Hall, 1 Handy, 434; Rubber Co. v. Bradford, 8 W. L. B. 35. A defendant can not under a plea of set-off for money received by plaintiff to the use of defendant recover damages for breach of an express contract. Smith v. Machine Co., 26 O. S. 562. See Corbin v. Bouve, 1 C. S. C. R. 259. As to a judgment, see Freeman on Judgment, sec. 446; O'Brien v. Young, 95 N. Y. 428; May v. Culyer, 55 N. W. Rep. 744.

² Bank v. Hemingray, 1 C. S. C. R.

435; 34 O. S. 381; Baker v. Kinsey, 41 O. S. 403; Stanbery v. Smythe, 13 O. S. 495; Miller v. Florer, 19 O. S. 356.

³ Baker v. Kinsley, 41 O. S. 403.

⁴ Granger v. Granger, 6 O. 35. See O. Code, sec. 5077.

⁵ McDonald v. Black, 20 O. 185.

⁶ Beesley v. Crawford, 19 O. 126.

⁷ Beach v. Hayward, 10 O. 455.

⁸ Williams v. Pultze, 2 W. L. B. 253.

⁹ Bates v. Lewis, 3 O. S. 459.

¹⁰ Follett v. Buyer, 4 O. S. 586.

¹¹ Knisely v. Evans, 34 O. S. 158.

¹² Wagner v. Stocking, 22 O. S. 297.

¹³ Bickett v. Garner, 31 O. S. 28.

¹⁴ Deatrick v. City, 1 O. C. C. 340.

it is sought to be established. Claims purchased to be set up are not available.¹ And the statute of limitations begins to run against a set-off from the date of the commencement of the action in which it is pleaded.²

Sec. 86. Cross-demands deemed compensated.—When cross-demands have existed between two persons under such circumstances that, if one had brought suit against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death, but the two demands must be deemed compensated, so far as they equal each other.³

Sec. 87. Judgment upon default.—When all or part of one or more of the causes of action are not put in issue by answer, judgment may be taken as upon default, for so much as is not put in issue.⁴ A default judgment can not be taken against a lunatic or infant,⁵ or in an action not founded upon contract,⁶ though it is not error to take default judgment upon an account.⁷ Where judgment by default has been taken for a sum less than due, there can be no recovery for the remainder.⁸ A default judgment may be set aside to allow a meritorious defense to be made,⁹ though not after the term at which it was taken.¹⁰

Sec. 87-1. Does a general denial need a verification.—The code requires that every pleading of fact shall be verified.¹¹ Is a general denial a pleading of fact required by this provision to be verified? Gholson, J., said:¹² "When an answer contains, as it may, a general denial without more, and an affidavit is made, that the facts stated in it are believed to be true, this must be considered as tantamount to a statement that the facts alleged in the petition did not occur; and this is a negative fact." Again, the same judge said:¹³ "A party is permitted to assert in his pleading those facts only which he believes to exist, or to have occurred; and he may deny those which he does not believe. These provisions of our code require a denial of allegations controverted, and make an affidavit of belief sufficient. The denial and the affidavit, taken together, may be regarded as

¹ *Strauss v. Insurance Co.*, 5 O. S. 59.

⁸ *Ewing v. McNairy*, 20 O. S. 315.

² *McEwing v. James*, 36 O. S. 152.

⁹ *Messick v. Roxbury*, 1 Handy, 190.

³ O. Code, sec. 5077.

¹⁰ *Johnson v. Taylor*, 2 Handy, 178.

⁴ O. Code, sec. 5320.

¹¹ O. Code, sec. 5102.

⁵ *Sturges v. Longworth*, 1 O. S. 544; *Long v. Mulford*, 17 O. S. 484.

¹² *McKenzie v. Ins. Co.*, 2 Disn. 223.

⁶ *Pollock v. Pollock*, 2 O. C. C. 143.

¹³ *Treadwell v. Commissioners*, 11 O. S. 189.

⁷ *Dallas v. Ferneau*, 25 O. S. 635.

a statement that the party does not believe the proposition which he controverts.

Trial courts within the knowledge of the author have taken the view that a general denial should be verified and have sustained motions to strike an unverified one from the files. It is a safer and better practice to verify them.

Sec. 87-2. Adoption of language of one defense into another.—It is a rule that each defense must be complete in itself, and must contain all that is necessary to answer the cause of action, or that part of it which it purports to answer. It is allowable, however, for the purpose of conciseness, to aver in one defense, or by way of introduction to all, facts alike applicable to several defenses, and to refer to them in the other defenses by language which will indicate a clear intent to incorporate them as allegations therein.¹ But such an adoption by reference can be of no avail where the new matter stated therein in itself constitutes no defense.² And it has also been considered that one defense may not, by averment merely, be incorporated bodily into another; that only facts which are necessary and pertinent to complete the allegations of new matter therein may be so incorporated, and only those will be deemed included in a subsequent defense which are clearly averred in a prior defense, and which by apt and appropriate language have been referred to in the subsequent defense as a part thereof.³

A defendant may also adopt in his answer and cross-petition facts and allegations in the petition which are essential to the claim of the defendant without repeating them; and if he does adopt them they should be deemed a part of his answer and cross-petition, entitling him to the same relief as if he had restated them. After such answer and cross-petition has been filed the plaintiff can not dismiss the action as to such defendant without the consent of the latter. Such defendant may, even though the plaintiff should attempt a dismissal, proceed in the action in all respects as if he was the plaintiff.⁴

¹ Bank v. Lee, 7 Abb. Prac. 372-386; Ritchie v. Garrison, 10 Abb. Prac. 246; Simmons v. Fairchild, 42 Barb. 404; Baldwin v. Telegraph Co.,

54 Barb. 506; Green v. Parsons, 14 N. Y. St. Rep. 97, 98.

² Garrett v. Wood, 50 N. Y. S. 950.

³ Id.

⁴ Brinkerhoff v. Smith, 57 O.S. 610.

CHAPTER 7.

THE REPLY.

Sec. 88. The reply — Contents.

89. A reply must be made when.

90. When reply need not be made.

Sec. 91. New matter in reply — Departure.

92. Remedy for departure.

Sec. 88. The reply — Contents.— When the answer contains new matter the plaintiff may either file a demurrer or a reply thereto. The reply may deny generally or specifically each allegation of new matter contained in the answer; and it may also allege any new matter not inconsistent with the petition which constitutes an answer to the new matter contained in the answer.¹ A reply may be permitted to be filed after verdict upon the theory that the allegations of the answer are denied;² but defendant waives the filing of a reply by proceeding to trial without objection.³ An averment in a reply that the pleader cannot admit or deny the allegations of the answer, and demands proof of the same, is not such a denial as will require the defendant to prove his averments.⁴ And failure to deny matter set up in an answer which is mere surplusage is not fatal, and does not therefore entitle the defendant to judgment upon the defense containing the same.⁵

Sec. 89. A reply must be made when.— Every material allegation of new matter in the answer not controverted by the reply will be taken as true; but allegations of new matter in the reply shall be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.⁶ The question always to be decided, therefore, is whether new matter is alleged. An answer setting up pay-

¹ O. Code, sec. 5079.

⁴ *Building Ass'n v. Clark*, 48 O. S.

² *Whitney v. Preston*, 29 Neb. 248. 427.

³ *Kepley v. Carter*, 49 Kan. 73;

⁵ *Kyser v. Cannon*, 29 O. S. 359.

⁶ 30 Pac. Rep. 182 (1892); *Lovell v. Wentworth*, 39 O. S. 614.

⁶ O. Code, sec. 5081. Failure to reply to a paragraph in an answer

ment of a claim sued upon is new matter requiring an answer,¹ and unless denied judgment may be rendered upon the pleadings.² And so with an answer setting up want of consideration.³ A plea of justification goes to the entire cause of action, and a reply must be filed thereto.⁴ And where in an action by a stockholder against a corporation it is claimed that the plaintiff ratified the act complained of, a reply must be made thereto.⁵ And so an answer to an action against a railroad company for ejecting a passenger, which admits the assault but justifies it, must be replied to before any evidence of excessive force can be introduced.⁶

Sec. 90. When reply need not be made.—A reply need not be made when the new matter contained in the answer does not constitute a defense;⁷ nor does an allegation which in effect amounts to merely an argumentative denial need a reply;⁸ or a plea of *non est factum* in an action on a note;⁹ or when an answer purports to admit a certain fact stated in the petition, when it does not state such a fact;¹⁰ or when the answer contains facts which could have been given under a general denial.¹¹ If the legal effect of the allegations in an answer amount to a general denial, it is not new matter requiring a reply.¹² Where an answer to an action for the recovery of goods stored with a warehouseman denies plaintiff's allegation and sets up a lien for storage, such lien is controverted without a reply.¹³ Where an answer denies the

containing a good affirmative defense admits its truth, and entitles the defendant to judgment. *Adams v. Tuley*, 1 Ind. App. 490.

¹ *Fewster v. Goodard*, 25 O. S. 276; *Edwards v. Edwards*, 24 O. S. 402; *Agricultural Works v. Creighton*, 21 Ore. 495; 28 Pac. Rep. 775.

² *Id.*

³ *Brown v. Ready*, 20 S. W. Rep. 1036 (Ky., 1893).

⁴ *Nelson v. Wallace*, 48 Mo. App. 194 (1891).

⁵ *Steinway v. Same*, 22 N. Y. S. 945 (1893).

⁶ *Powell v. Railway Co.*, 2 Am. Law Rec. 403.

⁷ *West v. Cameron*, 39 Kan. 736; 18 Pac. Rep. 894 (1888).

⁸ *Singer Mfg. Co. v. Brill*, 9 Am. Law Rec. 48; s. c., 5 W. L. B. 523.

⁹ *Brown v. Ready*, 20 S. W. Rep. 1036 (Ky., 1893).

¹⁰ *Hoisington v. Armstrong*, 22 Kan. 110.

¹¹ *Corry v. Campbell*, 25 O. S. 134.

¹² *Insurance Co. v. Kelly*, 24 O. S. 345; *Hoffman v. Gordon*, 15 O. S. 212; *State v. Williams*, 48 Mo. 210; *Simmons v. Green*, 35 O. S. 104.

¹³ *Eisler v. Storage Co.*, 16 Daly, 453.

commission of an act and alleges that it was done by a third party, it is a mere denial requiring no reply.¹ So a reply is not material or necessary where a special defense is set up with a general denial, and the facts of such special defense are admissible under the general denial.² An answer denying the contract alleged in the petition and setting up another needs no reply.³ In some states new matter not stating a counter-claim is deemed controverted without a reply.⁴ A set-off can never be set up in a reply except to a cross-petition.⁵

Sec. 91. New matter in reply—Departure.—As before stated, any new matter not inconsistent with the allegations of the petition which will constitute an answer to the new matter in the answer may be set forth in the reply.⁶ If new matter be set up which should properly go into the petition, it need not be stricken therefrom, as it may be permitted to be incorporated into the petition by amendment.⁷ A plaintiff, however, in stating new matter in a reply must not depart from the grounds taken in his petition as it will result in a departure, which is the statement of matter in a subsequent pleading as a cause of action or defense which is not pursuant to the previous pleading of the same party, and which does not support or fortify it.⁸ He cannot introduce a new cause of action,⁹ nor refer to documents not appearing in a previous pleading.¹⁰ It is a rule that every pleading subsequent to the petition on the part of the plaintiff must support the petition.¹¹ Thus, where the petition charges a direct undertaking, and the reply charges a guaranty, it is a de-

¹ *Hoffman v. Gordon*, 15 O. S. 212. *Heath v. Doyle*, 33 Atl. Rep. 333

² *Valley Ry. Co. v. Roos*, 9 O. C. C. (R. I., 1893).

203; *Ferrell v. Humphrey*, 12 O. S. 112; *Dayton Ins. Co. v. Kelley*, 24 O. S. 345; *Corry v. Campbell*, 25 O. S. 134.

⁶ See *ante*, sec. 88; *Fanning v. Insurance Co.*, 37 O. S. 344.

⁷ *Hiltz v. Scully*, 1 C. S. C. R. 555.

⁸ *State ex rel. v. W. H. M. & P. R. Co.*, 13 O. C. C. 375.

⁹ *Simmons v. Green*, 35 O. S. 104.

¹⁰ *Springer v. Bien*, 16 Daly, 275; *Durbin v. Fisk*, 16 O. S. 533; *Arthur v. Insurance Co.*, 78 N. Y. 462; *Day v. Insurance Co.*, 75 Ia. 700.

¹¹ *Insurance Co. v. Brown*, 25 Atl. Rep. 989 (Md., 1893).

¹² *West v. Meddock*, 16 O. S. 417; ¹³ *Heath v. Doyle*, 27 Atl. Rep. 333 (R. I., 1893).

parture.¹ And where the petition charges suretyship, a reply which shows a liability upon a subsequent undertaking is bad for departure.² But matter in a reply which explains or avoids the facts stated in the answer does not constitute a new cause of action.³ And where an answer alleges payment of a note sued upon, and a redelivery of it by him to the maker, and the reply admits the fact of the redelivery, but alleges that the maker had subsequently, for value, transferred it to another, who in turn transferred it to plaintiff, such a reply is not a departure.⁴ But where a defendant sets up an award in a suit upon an account, to which the plaintiff makes a reply admitting the same, there is no such departure as will vitiate a judgment for the amount admitted to be due.⁵

Sec. 92. Remedy for departure.—When the reply is a departure from the petition, the proper remedy for reaching the irregularity is by demurrer.⁶ This is not the remedy in all states.⁷ Mr. Bliss⁸ states that either motion to strike from the files or demurrer would doubtless be sustained. Demurrer is sustained because it is a defect of substance, and it probably is considered as coming under the eighth statutory ground that there are not facts stated sufficient to constitute a cause of action. This is the only head under which it may fall. The departure or the inconsistency of the new matter in the reply appears by a reference to the facts stated in the petition, and expunging the inconsistent matter in the reply there is not a cause of action stated. This is a roundabout way, and as Prof. Bryant says,⁹ “the more proper course under the code would seem to be motion to strike out the matter set up as inconsistent with the complaint as irrelevant matter.” But the approved method is by demurrer. A motion to strike from the files and a demurrer cannot properly be made at the same time;¹⁰ and indeed it is questionable whether a motion to strike from the

¹ *Philibert v. Burch*, 4 Mo. App. but no question was raised in the case as to the method. *Anderson v.*

² *Chaplin v. Baker*, 124 Ind. 385. *Imhoff*, 34 Neb. 335 (1892); *Insurance Co. v. Brown*, 25 Atl. Rep. 989

³ *Anderson v. Imhoff*, 34 Neb. 335. *ance Co. v. Brown*, 25 Atl. Rep. 989

⁴ *Bishop v. Travis*, 54 N. W. Rep. (Md., 1893).
460 (Minn., 1892).

⁵ *Benson v. Stein*, 34 O. S. 294. ⁷ See 6 Encyc. of Pl. & Pr. 468;

⁶ *Laws v. Carrier*, 2 C. S. C. R. 80. ⁸ Bliss Pl., sec. 396.

The objection was taken by demur- ⁹ Bryant Pl. 272.

rer in *Durbin v. Fisk*, 16 O. S. 534, ¹⁰ *Laws v. Carrier*, *supra*.

files should ever be made upon this ground, although it has been held that it may be done.¹ It must be remembered, however, that motions are made with a view to further pleading, and there can be no pleading filed after a reply. Failing to demur to an insufficient reply, however, does not deprive the defendant of his right to insist upon the proper judgment after verdict.² New matter in a reply which explains or avoids facts stated in an answer does not constitute a new cause of action and is therefore not subject to a demurrer.³

Sec. 92a. Want of reply waived.—If new matter in an answer be not denied by a reply, and the case is tried upon its merits, as though such matter had been denied, and no objection is made or exception taken, the want of reply will be considered as waived, and cannot be complained of upon error.⁴

Sec. 92b. Reply may be filed during trial.—Where a case has been tried without a reply having been filed, precisely as it would have been tried had a reply been filed before the trial commenced, the court may permit one to be filed during trial, and it is not necessary to withdraw a juror and continue the case.⁵

¹ *Philibert v. Burch*, 4 Mo. App. *Nooner v. Short*, 20 Kan. 624; *Jordan v. Bank*, 74 N. Y. 467.

² *Brown v. Crow*, 31 O. S. 492.

³ *O. C. & St. L. Ry. Co. v. Mc-*

⁴ *Anderson v. Imhoff*, 34 Neb. 335. *Kelvey*, 12 O. C. C. 426; *Hudson v. Voigt*, 15 O. C. C. 391. (A verdict

⁵ *Woodward v. Sloan*, 27 O. S. 592; and judgment will not be set aside *Lowell v. Wentworth*, 39 O. S. 614; on error on account of the omission *Valley Ry. Co. v. Roos*, 9 O. C. C. of filing a reply.)

201; *New v. Wambach*, 42 Ind. 456;

CHAPTER 8.

DEMURRER TO PETITION, ANSWER, REPLY AND COUNTER-CLAIM.

<p>Sec. 93. Nature and effect of demurrer.</p> <p>94. Demurrer to jurisdiction.</p> <p>95. Want of legal capacity to sue.</p> <p>96. Form of demurrer for want of legal capacity to sue — Corporation.</p> <p>97. Another action pending.</p> <p>98. Misjoinder of parties plaintiff.</p> <p>99. Defect of parties plaintiff and defendant.</p> <p>100. Form of demurrer for defect of parties.</p> <p>101. Misjoinder of actions.</p> <p>102. Misjoinder of separate causes of action against several defendants.</p> <p>103. Form of joint demurrer.</p>	<p>Sec. 104. Facts sufficient to constitute a cause of action not stated.</p> <p>105. Must be specific.</p> <p>106. Waiver of objections.</p> <p>107. When sustained for misjoinder.</p> <p>108. Demurrer to part and answer to part.</p> <p>109. Demurrer to reply.</p> <p>110. Form of demurrer to reply.</p> <p>111. Demurrer to answer.</p> <p>112. Form of demurrer to answer.</p> <p>113. Demurrer to counter-claim.</p> <p>114. When demurrer will lie — General rules.</p> <p>115. When demurrer will not lie — General rules.</p> <p>116. Miscellaneous general rules.</p>
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Sec. 93. Nature and effect of demurrer.— It seems hardly necessary to make the statement that the purpose of a demurrer is to deny the legal sufficiency of a pleading and to raise issues of law upon the facts stated.¹ It is made a pleading by the code,² and like any other pleading may be amended.³ It can only properly be filed where the grounds for its support are apparent on the face of the pleading.⁴ And unless the ob-

¹ *Brennan v. Ford*, 46 Cal. 7; *Wilson v. Mayor*, 15 How. Pr. 502.

² O. Code, sec. 5059; *Oliphant v. Whitney*, 34 Cal. 25; *Howard v. Railroad Co.*, 5 How. Pr. 206.

³ *Morrison v. Miller*, 46 Ia. 84.

⁴ O. Code, sec. 5063; *Neil v. Board of Trustees*, 31 O. S. 15; *Getty v.*

Hudson River R. R., 8 How. Pr. 177; *Wilson v. Mayor of New York*, 15 How. Pr. 500; *Coe v. Beckwith*, 31 Barb. 339; 6 Abb. Pr. 6, *Simpson v. Loft*, 8 How. Pr. 234; *Mayberry v. Kelly*, 1 Kan. 116; *Aurora v. Cobb*, 21 Ind. 492; *Collins v. Davis*, 37 Ia.

raised by it so appears, an answer and not demurrer is the proper pleading.¹

It is a fundamental rule that a demurrer admits the truth² of such facts only as are well pleaded,³ and does not therefore admit a conclusion of law, unwarranted by the facts on which it is predicated;⁴ nor will it reach indefiniteness and uncertainty,⁵ or duplicity in a pleading.⁶

As a demurrer searches the whole record,⁷ it will raise the question of the sufficiency of a petition, though filed to an answer;⁸ or it may search a distinct and independent defense set up in a supplemental answer which is complete in itself.⁹ Relief cannot always be obtained under a general demurrer, but the specific objections should be pointed out.¹⁰ If any count of a petition or answer is good, a demurrer to the whole petition should be overruled.¹¹ If the plaintiff is entitled to

¹ *Gillian v. Sigman*, 29 Cal. 687; *Moore v. Hobbs*, 77 N. C. 65; *Power v. Ames*, 9 Minn. 178.

² *Hance v. Hair*, 25 O. S. 349.

³ *Finch v. Board of Education*, 80 O. S. 37-41; *Faurot v. Neff*, 32 O. S. 446; *Peterson v. Roach*, 32 O. S. 374; *Railway Co. v. Moore*, 33 O. S. 384; *Van Doren v. Tjader*, 1 Nev. 380; *Freeman v. Hart*, 61 Ia. 525. Epithets charging fraud not admitted. *Kent v. Railway, etc. Co.*, 144 U. S. 75.

⁴ *Railway Co. v. Moore*, 33 O. S. 384; *Finch v. Board of Education*, 80 O. S. 41; *Peterson v. Roach*, 32 O. S. 374; *H. & R. Hydraulic Co. v. Railroad Co.*, 29 O. S. 341; *Supervisor, etc. v. Seaburn*, 11 Abb. N. C. 461; *Mitchell v. Treasurer*, 25 O. S. 148-53; *Wilson v. Clark*, 20 Minn. 367; *Sherwood v. Sherwood*, 45 Wis. 357; *Kleecamp v. Meyer*, 5 Mo. App. 444; *Freeman v. Hart*, 61 Ia. 525; *Hall v. Bartlett*, 4 Barb. 297; *Boley v. Griswold*, 2 Mont. 447.

⁵ *Trustees v. Odlin*, 8 O. S. 293; *Lewis v. Coulter*, 10 O. S. 451; *Union Bank v. Bell et al.*, 14 O. S. 208; *Rail-*

way Co. v. Iron Co., 46 O. S. 44; *Garard v. Garard*, 34 N. E. Rep. 443 (Ind., 1893); *Railroad Co. v. Maddux*, 34 N. E. Rep. 511 (Ind., 1893); *Kirsch v. Derby*, 96 Cal. 602; 31 Pac. Rep. 567.

⁶ *Corpening v. Worthington*, 12 S. Rep. 426 (Ala., 1893).

⁷ *Gordon v. Preston*, W. 341; *Trott v. Sarchett*, 10 O. S. 241; *Hillier et al. v. Stewart et al.*, 26 O. S. 652; *Bliss, Code Pldg.*, sec. 417a.

⁸ *Casper v. Hopple*, 8 O. C. C. 105; *Rothweiler v. Ryan*, 4 O. C. C. 388.

⁹ *Eckert v. Binkley*, 33 N. E. Rep. 619 (Ind., 1893).

¹⁰ *Lancaster Co. v. Trimble*, 34 Neb. 752.

¹¹ *Ford v. Rehman*, W. 434; *Carter v. Longworth*, 4 O. 384; *Spicer v. Giselman*, 15 O. 388; *Schroyer v. Richmond*, 16 O. S. 455; *Pinkum v. Eau Claire*, 31 Wis. 301; 51 N. W. Rep. 550 (1892). In *Churchill v. Pac. Imp. Co.*, 96 Cal. 490; 31 Pac. Rep. 560, it was held that a general demurrer to a petition which contains two separate counts is good.

any relief a demurrer is not well taken,¹ and if bad in part it is bad *in toto*.² A general demurrer to an answer which contains new matter and a specific denial is not well taken if the allegations denied are material.³ A demurrable objection cannot be taken by answer;⁴ and where a demurrer is pending and the defendant answers to the merits, the former is thereby waived.⁵

The filing of a demurrer also waives any defect in the service of process or return.⁶ Where the court is equally divided the demurrer will be overruled.⁷ The overruling of a demurrer, without further order made, is not a final order.⁸ A joint demurrer may be made, and even though there is no cause of action against one defendant, it is no reason for sustaining a demurrer by him jointly with two others against whom a cause of action appeared.⁹ One proper plea is good on joint demurrer.¹⁰ A pleading is not demurrable under the code system unless it is subject to some of the objections made grounds of demurrer by statute.¹¹ Nor will a demurrer lie to a petition on a contract which is merely voidable, as when made on Sunday, but such an objection must be raised by answer.¹² A motion to strike from the files and a demurrer cannot be filed at the same time, as the latter will waive the former.¹³

Sec. 94. Demurrer to jurisdiction.—A demurrer will lie when the court has no jurisdiction of the defendant or the subject of the action,¹⁴ though a demurrer to the juris-

¹ *George v. Edney*, 54 N. W. Rep. 986 (Neb., 1898); *Cheviet v. Lumber Co.*, 4 Wash. St. 731; 31 Pac. Rep. 24.

² *Carter v. Longworth*, 4 O. 884; 1 Ven. 248; 1 Atk. 450; 2 Atk. 44; Mad. Ch. 236; 1 John. Ch. 51; 5 John. Ch. 186.

³ *Railroad Co. v. Hall*, 26 O. S. 810.

⁴ *Petrie v. Lansing*, 66 Barb. 357;

⁵ *Bebinger v. Sweet*, 1 Abb. N. C. 268.

⁶ *Vore v. Woodruff*, 29 O. S. 245.

⁷ *Klonne v. Bradstreet*, 2 Handy, 74.

⁸ *Putnam v. Rees*, 12 O. 21.

⁹ *Baldwin v. Creed*, W. 729; *Holbrook v. Connelly*, 6 O. S. 199; *Hart*

v. Murray, 3 O. C. C. 431. *Cf.* sec. 106, *post*.

¹⁰ *Howard v. Edwards*, 89 Ga. 368; *May v. Jones*, 88 Ga. 308; 14 S. E. Rep. 552; *Lancaster v. Roberts*, 88 N. E. Rep. 27 (Ill., 1898); *Benedict v. Farlow*, 27 N. E. Rep. 807 (Ind., 1891).

¹¹ *Kent v. Bierce*, 6 O. 886; *Shroyer v. Richmond*, 16 O. S. 455.

¹² *Boone*, Code Pl., sec. 41; *Marie v. Garrison*, 88 N. Y. 14.

¹³ *Western Union Tel. Co. v. Eskridge*, 33 N. E. Rep. 238 (Ind., 1898); *Heavenridge v. Monday*, 34 Ind. 33.

¹⁴ *Wyman v. Hayes*, 1 Clev. Rep. 173.

¹⁵ O. Code, sec. 5062.

diction of the person is seldom available.¹ The phrase "that the court has no jurisdiction of the person" refers to the power of the court over the person, and not to the regularity of the proceedings.² Where a petition shows a defendant to be within a county, it cannot be demurred to merely because the return of a summons shows him "not to be found."³ Nor will it reach defective service, but is limited to the question whether or not the defendant is such a person as may be subjected to the process of the court.⁴ The want of jurisdiction of the person or subject-matter of the action can only be taken advantage of by demurrer when it is apparent on its face,⁵ and if not so apparent by answer;⁶ but it is not waived if not so raised.⁷ Want of jurisdiction being a specific ground of demurrer should be specially assigned. A demurrer to the sufficiency of a petition will not therefore raise the question of jurisdiction.⁸ An objection to the jurisdiction of the court cannot be waived by failure to demur or answer,⁹ but may be taken advantage of at any time before judgment.¹⁰

Sec. 95. Want of legal capacity to sue.—A demurrer on the ground that the plaintiff has not legal capacity to sue can be sustained only when the pleadings disclose incapacity, as infancy, lunacy, or when under some other disability.¹¹ The objection when apparent on the face of the petition is properly taken by demurrer,¹² and unless so raised, or by answer, it is

¹ Bliss' Code Pldg., sec. 405.

⁶ Atlantic, etc. Tel. Co. v. Railroad Co., 87 N. Y. 355.

² Nones v. Hope Ins. Co., 5 How. Pr. 96; Railroad Co. v. Railroad Co., 16 Abb. N. C. 249; Winfield Town Co. v. Maris, 11 Kan. 128; Boone, Code Pldg., sec. 48.

⁷ O. Code, sec. 5064; 4 Abb. N. C. 111; Blossom v. Barrett, 37 N. Y. 484; Fourth Nat'l Bank v. Scott, 81 Hun, 301; Patchin v. Peck, 88 N. Y. 39; Zabriskie v. Smith, 18 N. Y. 322.

³ Swann v. Iron & Coal Co., 58 Ga. 199.

⁸ Saxton v. Seiberling, 48 O. S. 554; 29 N. E. Rep. 179.

⁴ Railroad Co. v. Railroad Co., 16 Abb. Pr. (N. S.) 249; Nones v. Insurance Co., 5 How. Pr. 96; People v. Mt. Morris, 27 N. E. Rep. 757 (Ill., 1891). It cannot be reached on a motion to set aside a defective summons. A. & T. Telegraph Co. v. Railroad Co., 87 N. Y. 355.

⁹ O. Code, sec. 5064.

¹⁰ Youngstown v. Moore, 30 O. S. 193.

¹¹ Dale v. Thomas, 67 Ind. 570; Farrell v. Cook, 16 Neb. 483; Winfield Town Co. v. Maris, 11 Kan. 128; Boone, Code Pl., sec. 48.

⁵ Southern Pacific Co. v. Denton, 146 U. S. 202; Adams v. Store Service Co., 18 N. Y. S. 118.

¹² Haskins et al. v. Alcott et al., 13 O. S. 210; Koenig v. Nott, 2 Hilt. 323.

waived.¹ But where a petition cannot be assailed by a demurrer on this ground, because though good as to a part thereof it is not good to the petition as an entirety, a failure to demur for want of a legal capacity to sue is not such a waiver of the objection as will preclude the defendant from making it by an objection to evidence.² The incapacity of the party must affirmatively appear from the facts stated, and not from a want of facts.³ As corporate capacity is an essential fact to be alleged in a suit by a corporation, if it appears upon the face of the petition that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy.⁴ If, however, it is not so apparent it must of course be taken by answer.⁵ This will apply to foreign corporations under the statute requiring them to register before they can sue or be sued;⁶ and if it appears that a foreign corporation has not complied with the laws of registration, so called, then a demurrer may be filed thereto, and if it is not so apparent it should be raised by answer.⁷ If it appears that the plaintiff is an infant and sues in his own name a demurrer will lie.⁸ Where a person brings an action in a representative capacity but fails to make it apparent that he so sues, demurrer will lie rather than answer.⁹ To raise

¹ *Haskins v. Alcott*, 13 O. S. 210-217; *Hoop v. Plummer*, 14 O. S. 448-9; *Buckingham v. Buckingham*, 36 O. S. 68-78; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Hastings v. McKinley*, 1 E. D. Smith, 273; *Tapley v. Tapley*, 10 Minn. 448; *Palmer v. Davis*, 28 N. Y. 242; *Van Amringe v. Barnett*, 8 Bosw. 357; *Jones v. Steele*, 36 Mo. 324; *Pettigrew v. Washington Co.*, 43 Ark. 33.

² *Railway Co. v. O'Harra*, 50 O. S. 667.

³ *Boone*, Code Pl., sec. 48; *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *State v. Torinus*, 22 Minn. 272; *Am. Button Hole Co. v. Moore*, 2 Dak. 280-290.

⁴ *Phoenix Bank v. Donnell*, 40 N. Y. 413. See sec. 990, *post*.

⁵ *Id.*

⁶ See sec. 990, *post*.

⁷ In *Elektron Mfg. Co. v. Jones Bros. Electric Co.*, 8 O. C. C. 311,

the circuit court of Hamilton county, Ohio, held that a general denial will not raise the question of the right or capacity of the plaintiff to sue; and suggests that if this is desired, a special plea in the nature of a plea of abatement should be made. The prevailing view is that the question should be raised as pointed out in the text; and it is in harmony with principles discussed in another section. See sec. 99. Pleas in abatement are in fact abolished. The answer raises the same questions. *Weil v. Guerin*, 42 O. S. 299.

⁸ *Bartholomew v. Lyon*, 67 Barb. 86.

⁹ *Moir v. Dodson*, 14 Wis. 279; *Secer v. Pendleton*, 47 Hun. 281. So where petition fails to show qualification of guardian. *Spillane v. Missouri P. Ry.*, 111 Mo. 555; 20 S. W. Rep. 293. As to foreign administrator, see *Robbins v. Wells*, 26 How. Pr. 15.

the question of capacity to sue it should be specially assigned, and cannot be raised under any of the other grounds, as that the facts do not constitute a cause of action.¹ Where there are several parties plaintiff and it appears that any one of them has capacity to sue, a demurrer cannot be sustained.²

Sec. 96. Form of demurrer for want of legal capacity to sue — Corporation.—

The defendant demurs to the petition herein, and states as the grounds therefor:

1. That it appears by the petition that the plaintiff has not legal capacity to sue.

2. That it does not appear that the plaintiff is a corporation duly incorporated and entitled to sue.

And for a further and separate ground of demurrer to said petition, this defendant states:

That the petition does not state facts sufficient to constitute a cause of action.

NOTE.—This may be varied to suit the circumstances. See *ante*, sec. 95. If a guardian has not properly qualified, so state, etc. The codes generally provide that the grounds may be stated in the language of the statute, except as to want of capacity to sue and defect of parties, which must be specifically pointed out. See Bryant's Code Pldg., p. 214, and his table of Code References, p. 352, No. 143, which is a most excellent, convenient and useful compilation of references.

Sec. 97. Another action pending.—A demurrer lies when there is another action pending between the same parties.³ The pendency of a former suit between the same parties for the same cause is matter of defense to a second suit in a court of the same state, which has its foundation in justice and is firmly established.⁴ It must appear that the suit already pending will afford the plaintiff the relief to which he would have been entitled under the petition demurred to;⁵ the reason being, if full relief can be had in one suit no other shall be maintained.⁶ The pendency of an action in one state has been held to be no bar to a subsequent action for the same cause in another state.⁷ A demurrer will not be sustained where a like action is pending in a court of another state or in the United States courts.⁸ This is an objection which can very seldom appear on the face of the petition.⁹ A demurrer cannot be

¹ Saxton v. Seiberling, 48 O. S. 545.

² O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. Rep. 269.

³ O. Code, sec. 5062.

⁴ Weil v. Guerin, 42 O. S. 301.

⁵ Law v. Rigby, 4 Brown Ch. 60.

⁶ Boone's Code Pldg., sec. 49; Groshen v. Lyon, 16 Barb. 461; Daumbman v. Schulting, 51 How. Pr. 337.

⁷ Burrows v. Miller, 5 How. Pr. 51; Browne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 99.

⁸ Boone's Code Pldg., sec. 49; Burrows v. Miller, 5 How. Pr. 51; 4 How. Pr. 349; Sloan v. McDowell, 75 N. C. 29. Cf. Williams v. Ayrault, 31 Barb. 364.

⁹ Nash's Pldg., vol. 1, p. 155.

sustained if the action pending is for relief which cannot be granted in that action.¹

Sec. 98. Misjoinder of parties plaintiff.—A misjoinder of parties is ground for demurrer and can be taken advantage of in no other way.² By a misjoinder of parties is meant an excess of parties.³ A demurrer upon this ground should be taken to the whole petition.⁴ The code does not recognize the misjoinder of parties defendant as a cause for demurrer.⁵ A defendant improperly joined may demur for the reason that no cause of action is stated against him.⁶ Where parties are improperly joined, advantage of this misjoinder cannot be taken by parties properly joined.⁷ The demurrer must show wherein the misjoinder exists, by pointing out the particular plaintiffs misjoined, giving the reasons.⁸ It has been held in Ohio that a misjoinder of parties may be raised by general demurrer.⁹ If the misjoinder appears on the face of the petition, objection must be raised by special demurrer, and if not so taken is waived.¹⁰ If it does not appear on the face of the petition, an answer is proper, and it may be a ground of nonsuit.¹¹ If a petition makes a good cause against some of the parties, or against each of them separately, if they were improperly joined a demurrer will lie.¹²

Sec. 99. Defect of parties plaintiff and defendant.—Demurrer on the ground of defect of parties means a deficiency

¹ *Haire v. Baker*, 5 N. Y. 357.

² *Burns v. Ashworth*, 72 N. C. 496.

³ *Neil v. Trustees, etc.*, 81 O. S. 15-20; *Powers v. Bumcratz*, 12 O. S. 278; *Palmer v. Davis*, 28 N. Y. 245; *Berkshire v. Shultz*, 25 Ind. 528; *Mornan v. Carroll*, 35 Iowa, 22; *Truesdell v. Rhodes*, 26 Wis. 215-220; *Pomeroy on Rem.*, sec. 287.

⁴ *Hammond v. Hammond*, 28 Abb. N. C. 318.

⁵ Code, sec. 5062; *Clark v. Bayer*, 82 O. S. 299-311; *Palmer v. Davis*, 28 N. Y. 242; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Fish v. Hose*, 59 How. Pr. 238; *Powers v. Bumcratz*, 12 O. S. 278; *Neil v. Trustees, etc.*, 81 O. S. 15-20.

⁶ *Nichols v. Drew*, 94 N. Y. 22; 1-8.

Lewis v. Williams, 8 Minn. 151-154;

Belknap v. Caldwell, 33 Ind. 14.

⁷ *Phister v. Dacey* (Sup. Ct. Cal.), 3 West. C. Rep. 308.

⁸ *Fultz v. Walters*, 2 Mont. 165;

Barney v. Drexel, 33 Hun, 419; 19 N. Y. Week. Dig. 515; *Irvine v. Wood*, 7 Colo. 477.

⁹ *Bartges v. O'Neil*, 18 O. S. 72, 76.

Contra, Tennant v. Pfester, 51 Cal. 511.

¹⁰ *O'Callaghan v. Bode*, 84 Cal. 489;

24 Pac. Rep. 269 (18—); *Gellam v. Sigman*, 29 Cal. 637; *Tennant v. Pfester*, 51 Cal. 511-515; *Patchin v. Peck*, 38 N. Y. 39.

¹¹ *South Fork, etc. v. Snow*, 49 Cal. 155.

¹² *Shamokin Bank v. Street*, 16 O. S.

of, and not too many, parties.¹ The same general principle underlying all grounds of demurrer is applicable here. When the defect appears on the face of the petition it may be demurred to, but when it does not so appear and it is necessary to introduce evidence to make the defect apparent, then an answer is the proper remedy.² A demurrer to a petition upon the ground of defect of parties should specifically point out and name those who should have been, but were not, made parties;³ and no one can demur to a petition upon this ground unless his own interest requires that the defect be cured.⁴ A demurrer for non-joinder of parties is well taken where it appears that the court cannot determine the controversy before it without prejudice to the rights of others, nor by saving those rights.⁵ In an action against one of two obligors or contractors on a joint obligation or contract, the petition is demurrable for defect of parties.⁶ And where one of the joint owners is not made a party plaintiff, but the defendant fails to avail himself of such defect, he cannot be allowed to show such non-joinder in diminution of the amount to be recovered.⁷ A personal representative of a deceased partner cannot be joined as a party defendant with the surviving partner to an action for a partnership debt, when the petition does not show that the same can be made of the survivor.⁸ A

¹ *Richtmyer v. Same*, 50 Barb. 55; *Railroad Co. v. Schuyler*, 17 N. Y. 592. Where there is a misjoinder, or an excess of parties plaintiff, there is not a defect of parties. It must be a defect, not an excess. *McKee v. Eaton*, 26 Kan. 226; *Murray v. McGarigle*, 69 Wis. 484 (1887).

² Petition filed by husband and wife showing no cause of action in their favor jointly may be demurred to. *Bartges v. O'Neil*, 18 O. S. 72. The right to make the defense by answer is not waived by failure to so demur. *Masters v. Freeman*, 17 O. S. 328. If no objection be made by answer or demurrer it is waived. *Hoop v. Plummer*, 14 O. S. 448. If not raised by demurrer it is waived. *Bryan v. Mullinix*, 45 Iowa, 631. A

defect of parties apparent on the face of a petition can only be raised by demurrer. An answer raising a defect of parties tenders an issue to be tried. *McCormick v. Blossom*, 40 Iowa, 256; *Lowry v. Harris*, 12 Minn. 255.

³ *Dewey v. State*, 91 Ind. 182; *Newcome v. Wiggins*, 78 Ind. 305, 315; *Cox v. Bird*, 65 Ind. 277; *Durham v. Bischof*, 47 Ind. 211; *Baker v. Hawkins*, 29 Wis. 576; *Murray v. McGarigle*, 69 Wis. 488-90; *O'Callaghan v. Bode*, 84 Cal. 489.

⁴ *Newbould v. Warrin*, 14 Abb. Pr. 80.

⁵ *Wallace v. Eaton*, 5 How. Pr. 99.

⁶ *Eaton v. Balcom*, 38 How. Pr. 80.

⁷ *Zabriskie v. Smith*, 18 N. Y. 322.

⁸ *Voorhis v. Childs*, 17 N. Y. 354.

demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action does not raise the question of defect of parties.

Sec. 100. Form of demurrer for defect of parties.—

[*Caption.*]

Defendant [*or*, plaintiff] demurs to plaintiff's petition [*or*, defendant's answer] upon the following grounds, to wit:

1. That there is a defect of parties plaintiff in this: A. B. is a necessary party plaintiff and should be joined; *or*, that there is a defect of parties defendant in this: A. B. is a party defendant and should be joined.

NOTE.— See sec. 99, *ante*.

Sec. 101. Misjoinder of actions.— As the code specifically points out what classes of actions may be joined,¹ it follows that, where these provisions are not complied with by the pleader, objections may be taken thereto by the defendant. This may be done by demurrer,² and the plaintiff compelled to elect upon which of the actions improperly joined he will rely.³ Or it may also be taken by answer.⁴ A demurrer will lie where two causes of action are improperly joined, one being good and one bad.⁵ It is no ground of demurrer that separate causes of action which may be united in the same petition are all stated in one count and not separately as required by the code. It has been stated elsewhere that demurrer is not the proper remedy in such cases.⁶ A demurrer on the ground that there is a misjoinder of causes of action will lie only where the joinder itself is forbidden, such as uniting a cause of action in tort with one arising on contract, and has no reference whatever to the manner in which causes are joined.⁷ If it appears that there are two causes of action improperly joined, it will vitiate the whole petition, even though there are other causes of action properly joined.⁸ The fact that two causes of action are improperly joined in one count does not deprive the defendant of his right to demur thereto

¹ See ch. 2.

² O. Code, sec. 5062.

³ Boone's Pldg., sec. 52.

⁴ Cloon v. Insurance Co., 1 Handy, 83; Bratton v. Smith, 2 W. L. M. 497; James v. Wilder, 25 Minn. 305.

⁵ Higgins v. Crichton, 68 How. Pr. 354; 2 Civ. Proc. R. 817.

⁶ See *ante*, sec. 20.

⁷ Hardy v. Miller, 11 Neb. 395 (1881).

⁸ Stanton v. Railway Co., 15 Civ. Proc. R. 296.

for misjoinder.¹ The purpose of the demurrer upon this ground is to compel the plaintiff to elect upon which of the two or more causes of action improperly united he will proceed.²

Sec. 102. Misjoinder of separate causes of action against several defendants.—Where causes of action are joined against two or more defendants which do not affect all of them, a demurrer will lie thereto at the instance of a defendant who is so affected.³ It is not to the misjoinder of parties; and the rule that a defendant against whom a good cause of action is pleaded may not demur because too many are joined does not apply.⁴ An action against trustees or executors for negligence cannot be joined with one against a lessee upon a contract.⁵

Sec. 103. Form of joint demurrer.—

Now come [*naming defendants*] and separately and severally demur to the plaintiff's cause of action, and say that said petition does not state facts sufficient to constitute a cause of action against them jointly or severally.

NOTE.—*Hanover School Tp. v. Gant*, 125 Ind. 557; *Axtel v. Chase*, 83 Ind. 546.

Sec. 104. Facts sufficient to constitute a cause of action not stated.—The extent or scope of this ground of demurrer is so far reaching that it will be impracticable to attempt to enter into anything like a full discussion, except to state a few general rules. That a petition may be subject to a demurrer upon this ground, the facts stated, if admitted to be true, must be such as will warrant the court in holding that there is a cause of action stated;⁶ and this must be apparent from all the allegations in the petition.⁷ In determining this question it is well understood that mere matters of form will be disregarded,⁸ so that it matters not if facts are

¹ *Taylor v. Elevated Railway*, 52 N. Y. S. 299; *Wiles v. Suydam*, 64 N. Y. 173; *Goldberg v. Utley*, 60 N. Y. 427.

² *Sullivan v. Railroad Co.*, 1 Civ. Proc. R. 285.

³ O. Code, sec. 5062; *Nichols v. Drew*, 94 N. Y. 22; *Church v. Stanton*, 44 Hun, 628; *Hess v. Railroad Co.*, 29 Barb. 391.

⁴ *Id.*

⁵ *Compton v. Hughes*, 88 Hun, 377, 378.

⁶ *People v. Mayor*, 28 Barb. 240; *Spear v. Downing*, 23 How. Pr. 30.

⁷ *Pierson v. McCurdy*, 61 How. Pr. 184; *Calvo v. Davies*, 73 N. Y. 211.

⁸ *Lyon v. Fish*, 20 O. 100; *Trustees, etc. v. Robinson*, W. 436; *Wood v. Funk*, 7 O. (pt. 1), 196; *Burns v. Patterson*, 2 Haudy, 270.

artificially stated,¹ or that they are imperfectly or informally stated,² if a good cause of action is set forth. It must be assumed that not only the facts stated are true, but that such as may by reasonable and fair intendment be implied are also true.³ A failure to demur on the ground that the petition does not state facts sufficient to constitute a cause of action is not a waiver of the objection, nor does it conclude one's right to insist on it in any stage of the proceedings on error.⁴

A general demurrer will not lie to a petition stating a *prima facie* cause of action,⁵ nor to a defective statement of facts;⁶ nor will it reach the question of the jurisdiction of the court,⁷ or defect of parties.⁸ Where a petition on its face shows a cause of action barred by the statute of limitations, no legal cause of action is stated, and a demurrer thereto on the ground that the petition does not state facts sufficient to constitute a cause of action raises the question of the statute of limitations as well as other defects in the petition.⁹ A demurrer in the language of the statute: "That the petition does not state facts sufficient to constitute a cause of action," is sufficiently specific.¹⁰ An objection that there is another action pending cannot be made under a demurrer upon this ground,¹¹ nor can a question whether a petition states a cause of action be considered upon a motion to dismiss.¹²

¹ Wetmore v. Porter, 92 N. Y. 76.

² Marie v. Garrison, 88 N. Y. 14.

³ Milliken v. W. U. Tel. Co., 110 N. Y. 408.

⁴ Nash, Pl. & Pr. 160; Gould v. Glass, 19 Barb. 179, 186; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Coffin v. Reynolds, 87 N. Y. 640; Higgins v. Freeman, 3 Duer, 650; Budd v. Bingham, 18 Barb. 494.

⁵ Campbell v. Taylor, 8 West. C. Rep. 541 (Sup. Ct. Utah).

⁶ Trustees, etc. v. Odlin, 8 O. S. 298; Lewis v. Coulter, 10 O. S. 451; Union Bank of Massillon v. Bell et al., 14 O. S. 200; Everett v. Waymire, 80 O. S. 808.

⁷ Railroad Co. v. Bridgett, 94 Ind. 216.

⁸ Grain v. Aldrich, 38 Cal. 514.

⁹ Seymour v. Railway Co., 44 O. S. 12; S. P. Valley Ry. Co. v. Franz, 48 O. S. 623-625; Vore v. Woodford, 29 O. S. 245.

¹⁰ Wilson v. Polk Co., 112 Mo. 126; O'Rourke v. Sioux Falls, 54 N. W. Rep. 1044 (S. D., 1898); Howland v. Kenosha Co., 19 Wis. 247; Kent v. Snyder, 30 Cal. 606.

¹¹ Williams v. Lewis, 124 Ind. 344; 24 N. E. Rep. 733 (Ind., 1890).

¹² Richmond v. Brookings, 46 Fed. Rep. 241.

Sec. 105. Must be specific.—The demurrer must specify the grounds of objection to the petition, and unless it does so it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action, or that the court has not jurisdiction of the subject-matter.¹ The codes differ upon this question. Under some the demurrer will be disregarded unless the grounds are specifically set forth,² and the rules for specification are necessarily more stringent. In New York it is held that, in demurring upon the ground of defect of parties, the names of those who should have been made parties should be set forth, and the same view is entertained elsewhere.³ Nothing more is required than that the party demurring shall clearly specify upon which of the several grounds enumerated he relies.⁴

Sec. 106. Waiver of objections.—When any of the defects enumerated in section 5062 do not appear on the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state sufficient facts to constitute a cause of action.⁵

If a demurrer and an answer be filed at the same time to the same pleading, tendering issues to the entire action, it is a waiver of the demurrer.⁶ A defendant cannot demur and answer to the same matter.⁷ An objection not taken advantage of by answer or demurrer was deemed waived where the defendant joined issue and went to trial, although the petition was demurrable, as not stating facts sufficient to constitute

¹ O. Code, sec. 5063.

² N. Y. Code, sec. 490; Dodge v. Colby, 108 N. Y. 445.

³ See sec. 99, *ante*.

⁴ Durkee v. Saratoga, etc. R. R., 4 How. Pr. 226; Getty v. Hudson River R. R. Co., 8 How. Pr. 177; De Witt v. Swift, 8 How. Pr. 281; Lagow v. Neilson, 10 Ind. 183.

⁵ Code, sec. 5064.

⁶ Calvin v. State of Ohio, 12 O. S. 60; Danville, etc. Turnpike Co. v. Stewart, 2 Met. (Ky.) 119; Hosier v. Eliason, 14 Ind. 523; Stocking v. Burnett, 10 O. 187; Smead v. Chrisfield, 1 D. 17.

⁷ Davis v. Hines, 6 O. S. 473; Spellman v. Weider, 5 How. Pr. 5; Munn v. Barnum, 1 Abb. Pr. 281; 13 How. Pr. 563.

a cause of action.¹ When proper service is made, misnomer is not fatal to jurisdiction.²

Failing to except to the overruling of a demurrer to a petition, and answering over, waives error in overruling the demurrer, if the answer supplies the defect in the petition.³ Such is not the case where a demurrer to the statute of limitations or statute of frauds is erroneously overruled.⁴ The objection that the petition does not state facts sufficient to constitute a cause of action may be made at any time before final judgment on error, and can never be waived under the Ohio code.⁵ Where it appears in a petition in an action brought by two plaintiffs that the cause of action is not joint but several, the right to set up such defense by answer is not waived by failure to demur.⁶ An objection to a defect of parties is waived unless taken by demurrer or answer;⁷ and so with misjoinder of parties,⁸ or of causes of action,⁹ or the pendency of another action.¹⁰

Sec. 107. When sustained for misjoinder.— When a demurrer is sustained on the ground of misjoinder of several causes of action in a petition or answer, the court, on motion of the party who filed the pleading, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and the same shall be proceeded in without further service.¹¹

Sec. 108. Demurrer to part and answer to part.— The defendant may demur to one or more of the several causes of action stated in the petition and answer as to the residue.¹² A defendant cannot demur and answer to the same cause

¹ *Pepper v. Sidwell*, 36 O. S. 454, 456; *Spence v. Ins. Co.*, 40 O. S. 517; *Vore v. Woodford*, 29 O. S. 245.

² *Spence v. Ins. Co.*, 40 O. S. 517.

³ *Lindeman v. Ziegler*, 12 W. L. B. 319; *Ins. Co. v. McGookey*, 33 O. S. 555. But see sec. 1287, *post*, p. 1179.

⁴ *Zieverink v. Kemper*, 19 W. L. B. 270; *Myers v. Croswell*, 45 O. S. 543.

⁵ Sec. 5064: *Youngstown v. Moore*, 30 O. S. 133.

⁶ *Masters v. Freeman et al.*, 17 O. S. 232.

⁷ *De Puy v. Strong*, 37 N. Y. 373;

Decker v. Decker, 108 N. Y. 128;

Wemple v. McManus, 15 N. Y. S. 36.

⁸ *Fisher v. Hall*, 41 N. Y. 416.

⁹ *Jefferson v. Elevated R. R. Co.*, 11 N. Y. S. 438; *People v. Murray*, 8 Hun, 577.

¹⁰ *Remington v. Walker*, 21 Hun, 322.

¹¹ Code, sec. 5065. See *Cloon v. City Ins. Co.*, 1 H. 32; 14 Kan. 130.

¹² O. Code, sec. 5066.

of action at the same time. The court will, in such case, compel him to elect between them.¹ A demurrer cannot be joined with a motion. It is not good practice to allow it.² A demurrer to certain defenses and reply to others is permissible.³ The statute allowing double pleading does not extend to allowing a general demurrer and a plea going to the whole declaration at the same time.⁴ Where there are several defendants, one may demur and another file an answer.⁵

Sec. 109. Demurrer to reply.—The defendant may also demur to the reply, or to a separate traverse, or avoidance contained in the reply, of a defense or counter-claim, on the ground that it is insufficient in law on its face.⁶ A failure to demur to the reply because it does not contain matter sufficient to avoid a defense set up in the answer is not a waiver of the right to object to the sufficiency of the reply, and will not affect the judgment to be rendered.⁷ A demurrer will lie to a reply that contains new matter inconsistent with the facts alleged in a petition.⁸ Error in sustaining a demurrer to a reply setting up new matter sufficient to avoid a defense is ground for reversal of judgment, unless the record shows such error to have been otherwise waived.⁹ A judgment will not be reversed on error for sustaining a demurrer to a reply, where plaintiff files an amended reply, presenting the same issues in addition to others and the case proceeding to trial and judgment on the issues thus presented.¹⁰

Sec. 110. Form of demurrer to reply.—

[*Caption.*]

The defendant demurs to the reply of plaintiff for the following reasons apparent on the face thereof, to wit:

1st. That the facts stated therein are not sufficient in law to constitute a defense to the answer of the defendant.

2d. *Etc.*

¹ Davis v. Hines, 6 O. S. 473; Penn. & O. Can. Co. v. Webb, 9 O. 186; Stocking v. Burnett, 10 O. 137.

⁵ Allison Bros. Co. v. Hart, 9 N. Y. S. 692.

² Gibson & Co. v. Ohio Farina Co., 3 Dian. 499; Laws v. Carrier, 2 C. S. C. R. 80; 4 W. L. G. 81; Wyman v. Hayes, 1 Clev. Rep. 178.

⁶ O. Code, sec. 5067.

⁷ Brown v. Kroh, 31 O. S. 492. See McWilliams v. Same, 27 O. S. 592.

³ Stewart v. Welch, 41 O. S. 483, 491.

⁸ Newcomb & Co. v. Weber, 1 C. S. C. R. 12, 14.

⁹ Knox County Bank v. Lloyd, 18 O. S. 353.

⁴ Craighead v. Kemble, Tapp. 246.

¹⁰ Sage v. Sleutz, 23 O. S. 1.

Sec. 111. Demurrer to answer.—The plaintiff may demur to a counter-claim, set-off or defense consisting of new matter contained in the answer on the ground that it is insufficient in law on its face.¹ The only ground specified under this provision is that the answer is insufficient in law on its face. The New York code is similar.² It is there held that if the new matter does not state facts sufficient to constitute a defense, it may be subject to a demurrer for insufficiency.³ In demurring to an answer it will be sufficient to allege generally that the answer is insufficient to enable the plaintiff to avail himself of any questions affecting the merits of the answer.⁴ A general demurrer to an answer containing several distinct grounds of defense may be overruled if any one of the defenses is sufficient to bar the action.⁵ And such a demurrer to an answer searches the record only to the extent that a general demurrer to the petition would lie, and does not reach defects available only upon special demurrer, such as misjoinder of plaintiffs.⁶ An answer to a petition seeking equitable relief is not demurrable for the reason that it sets up a partial and not complete bar.⁷ And so is an answer denying all material allegations good on demurrer.⁸ An objection to the sufficiency of the answer should be taken by demurrer when it relates to matters of substance.⁹ A motion to strike out an entire answer for insufficiency cannot be entertained, as demurrer is the proper remedy.¹⁰ If defenses set up in a joint answer of several defendants are not available to all, a demurrer will lie to the answer.¹¹

Where, in an answer to a suit by a widow for her distributive share of an estate, an answer is interposed that she is

¹ O. Code, sec. 5068.

² N. Y. Code, sec. 494.

³ *Merritt v. Millard*, 5 Bosw. 645;
Otis v. Shantz, 28 N. Y. St. R. 69.

⁴ *Arthur v. Brooks*, 14 Barb. 533;
Hyde v. Conrad, 5 How. 112.

⁵ *Mansfield, Coldwater & Lake
Michigan R. R. v. Hall*, 26 O. S. 310;

Shroyer v. Richmond, 16 O. S. 455;
Hale v. Omaha Nat. Bank, 49 N. Y.

626; *Hyde v. Supervisors, etc.*, 43
Wis. 129; *Bruce v. Benedict*, 31 Ark.

301; *First Nat. Bank v. How*. 28

Minn. 150; *Seaver v. Hodgkin*, 63
How. Pr. 123.

⁶ *Rothweiler v. Ryan*, 4 O. C. C.
388-40.

⁷ *Peebles v. Isaminger*, 18 O. S. 490.
⁸ *Lewis v. Coulter*, 10 O. S. 451;

Ketcham v. Zerega, 1 E. D. Smith,
553.

⁹ *Finch v. Finch*, 10 O. S. 501.

¹⁰ *Goodman v. Robb*, 41 Hun, 605.

¹¹ *Taylor v. Spaulding*, 13 Civ. Pro.
R. 123.

barred by a post-nuptial agreement, such answer is insufficient on demurrer, unless it contain an averment that the provision made for her was fair, reasonable and equitable.¹ A plaintiff cannot, without leave of court, dismiss his action without prejudice after his demurrer to the answer is overruled. It is a final submission unless leave is obtained to reply or amend.²

Sec. 112. Form of demurrer to answer.—

Plaintiff demurs to the answer of the defendant upon the following grounds, to wit:

1st. That the facts stated therein are insufficient in law, on its face, to constitute a defense to plaintiff's cause of action.
2d. *Etc.*

Sec. 113. Demurrer to counter-claim.—The plaintiff may also demur to a counter-claim or set-off upon which the defendant demands an affirmative judgment, when it appears on its face, either — 1. That the court has no jurisdiction of the subject thereof. 2. That the defendant has not legal capacity to recover on the same. 3. That there is another action pending between the same parties for the same cause. 4. That the counter-claim is not of the character specified in section 5072. 5. That the counter-claim or set-off does not state facts sufficient to entitle the defendant to the relief demanded.³

This provision can be resorted to only where a defendant asks an affirmative judgment, so that he becomes practically a plaintiff. It does not apply when the counter-claim set up merely extinguishes the plaintiff's cause of action.⁴

Sec. 114. When demurrer will lie — Some general rules. A demurrer will lie on the ground of triviality of cause,⁵ to a part of a claim,⁶ or an answer,⁷ or to an indictment or information,⁸ or to variance on proferat,⁹ to lapse of time appearing on the face of the pleading,¹⁰ to misjoinder of defendants,¹¹ for

¹ Miller v. Miller, 16 O. S. 527.

² Beaumont v. Herrick, 24 O. S. 445.

³ O. Code, sec. 5089.

⁴ Otis v. Shantz, 88 N. Y. St. R. 434.

⁵ Carr v. Inglehart, 8 O. S. 457.

⁶ Higgins v. Pelton, 4 W. L. B. 751.

⁷ Everett et al. v. Waymire et al., 20 O. S. 308.

⁸ State v. Brower, 80 O. S. 101; Davis v. State, 82 O. S. 24.

⁹ Kemp v. McGuigin, Tapp. 18.

¹⁰ Williams v. Presbyterian, etc., 1 O. S. 478; 9 W. L. J. 303; Hill v. Henry, 17 O. S. 11; Sturges v. Burton, 8 O. S. 215; Commissioners, etc. v. Andrews, 18 O. S. 49.

¹¹ Foote v. City of Cincinnati, 9 O. S. 81; Milius v. Marsh, 1 D. 512.

misjoinder of husband and wife,¹ for misjoinder of causes of action,² to an action brought in a firm name where it is not alleged that they are doing business in the state.³

Sec. 115. When demurrer will not lie — General rules.—

A demurrer will not lie for want of parties,⁴ nor for omission to attach copy of instrument,⁵ nor to bill of particulars before a justice of the peace,⁶ nor to matter of form,⁷ nor for defective process or service,⁸ nor for indefiniteness,⁹ nor to a negative pregnant,¹⁰ nor to the title of a suit wrongfully stated,¹¹ nor to a part of a cause,¹² nor for duplicity or redundancy,¹³ nor because a petition asks relief that cannot be granted,¹⁴ nor to make a petition definite and certain,¹⁵ for misnomer,¹⁶ for argumentativeness or surplusage,¹⁷ for irrelevant matter merely,¹⁸ nor because the allegations are hypothetical,¹⁹ nor for want of verity in the allegations,²⁰ nor for statements of matters of belief,²¹ nor where different grounds of defense are improperly intermingled in one statement,²² nor because of inconsistent statements.²³

Sec. 116. Miscellaneous general rules.— On demurrer judgment is always given against the party that commits the first fault in pleading.²⁴ Where a demurrer to an indictment is sustained, and the defendant discharged by the court of

¹ *Bartges v. O'Neil*, 18 O. S. 72.

² *Corbin v. Bouve*, 1 C. S. C. R. 259; *Nimocks v. Inks*, 17 O. 598.

³ *Haskins v. Alcott*, 18 O. S. 210; *Brownson v. Metcalf*, 1 H. 188.

⁴ *Trustees, etc. v. McCaughy*, 2 O. S. 152.

⁵ *Calvin v. State*, 12 O. S. 60.

⁶ *Bruder v. Biehl*, 1 O. C. C. 85.

⁷ *Trustees, etc. v. Robinson*, W. 486; *Lyon v. Finch*, 20 O. 100; *Wood v. Funk*, 7 O. (pt. 1), 196; *Burns v. Patterson et al.*, 2 H. 270.

⁸ 58 Ga. 99.

⁹ *Railway Co. v. Iron Co.*, 46 O. S. 44; *Trustees, etc. v. Odlin*, 8 O. S. 298; *Lewis v. Coulter*, 10 O. S. 451; *Union Bank, etc. v. Bell*, 14 O. S. 208.

¹⁰ *Lawrence v. Cooley*, 1 Clev. Rep. 178.

¹¹ *Blackwell v. Montgomery*, 1 Handy, 40; *Cunningham v. Phillips*, T. 152.

¹² *Smith v. Wyatt*, 2 C. S. C. R. 12.

¹³ *Cannon v. Lindsay*, 85 Ala. 198.

¹⁴ *Townsend v. Bogert*, 126 N. Y. 370.

¹⁵ *Everett v. Waymire*, 30 O. S. 308.

¹⁶ *Slocumb v. McBride*, 17 O. 607.

¹⁷ 18 Abb. Pr. 384.

¹⁸ *Watson v. Husson*, 1 Duer, 242.

¹⁹ *Taylor v. Richards*, 9 Bosw. 679.

²⁰ *McGregor v. McGregor*, 21 Iowa, 441.

²¹ *Stoutenburg v. Lybrand*, 18 O. S. 228.

²² *Akerly v. Vilas*, 25 Wis. 708.

²³ *Larimer v. Kelley*, 10 Kan. 298.

²⁴ *Trott v. Sarchett*, 10 O. S. 241; *Headington v. Neff*, 7 O. (pt. 1), 299.

common pleas, the circuit court, under section 7356 of the Revised Statutes of Ohio, has no jurisdiction on a petition in error filed in behalf of the state to review the action of the court of common pleas in sustaining the demurrer.¹ A judgment will not be reversed for error in sustaining a demurrer to a defense, where the defendant does not stand upon such defense, but so amends his answer that upon the trial he has the benefit of all the averments of the original defense.² A demurrer to a reply reaches the cross-petition.³ Where a demurrer is filed to an entire defense it is error to sustain it as to part and strike out the remainder.⁴

The rule that the demurrer reaches the first defective pleading is subject to the qualification that it is only an objection to the jurisdiction, or that the petition does not state facts sufficient to constitute a cause of action, that searches the record upon a demurrer to an answer.⁵ A defect in the conclusion of a plea cannot be reached by general demurrer.⁶ Error in sustaining a demurrer is waived by setting up the same matter in the answer or reply.⁷ A ruling on a demurrer is vacated by an appeal of a cause,⁸ and a demurrer waives the right to file a motion.⁹ A wife may demur even though her husband has filed an answer.¹⁰ Joinder on demurrer is not necessary.¹¹

¹ State v. Simmons, 49 O. S. 305.

⁶ Lyon v. Fish, 20 O. 100.

² Kitchen v. Lauderback, 48 O. S. 177.

⁷ Davis & Co. v. Gray, 17 O. S. 330; Sage v. Sleutz, 23 O. S. 1.

³ Hillier et al. v. Stewart et al., 26 O. S. 652.

⁸ Wanzer v. Self, 30 O. S. 378; Rust v. Rust et al., 29 O. S. 440.

⁴ Armstrong v. Hinds, 9 Minn. 356.

⁹ Wyman v. Hayes, 1 Clev. Rep. 173.

⁵ Stratton v. Allen, 7 Minn. 502; Eaton v. North, 25 Wis. 514.

¹⁰ Graf v. Wirthwein, 1 Handy, 19.

¹¹ McCracken v. West, 17 O. 16.

CHAPTER 9

MOTIONS.

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| Sec. 117. Remedy for formal defects. | Sec. 121. To strike out. |
| 118. Motion as to jurisdiction. | 121a. Same — Answering after motion overruled. |
| 119. Motion to quash summons and dismiss action for want of jurisdiction. | 122. To strike from files. |
| 120. Motion should specifically point out. | 123. To make definite and certain. |
| | 124. Other motions. |
| | 125. Notice of motion. |

Sec. 117. Remedy for formal defects.— Under the code all matters of form are remedied upon motion,¹ which is an application addressed to a court for an order with respect thereto.² This is a departure from the common law, as the remedy there pursued was a special demurrer. Several objects may be included in the same motion if they all grow out of or are connected with the action or proceeding in which it is made.³ It is said that when a motion is filed to a petition the defendant will not be in default, although he has failed to file a demurrer or answer until the motion is disposed of.⁴ This is the universal practice; but where a motion is without merit and made for delay the court would be justified in rendering judgment by default.⁵ Otherwise, where a motion is made in good faith, it would be a hardship upon a defendant to declare him in default when he has a motion pending. He may be unable to plead until the same is disposed of.

Sec. 118. Motion as to jurisdiction.— A motion may properly be made by a defendant for the purpose only of questioning the jurisdiction of the court over the person without submitting himself thereto, and when based only upon that ground it does not amount to an appearance or waiver.⁶ But it amounts to an appearance by the party and a waiver of the question of jurisdiction,⁷ where the motion is to strike from the files the summons and the return, and also all the papers filed

¹ Grannis v. Hooker, 29 Wis. 65.

² O. Code, sec. 5121; Callender v. Railroad Co., 11 O. S. 520.

³ O. Code, sec. 5122.

⁴ Maxwell on Pldg., p. 362.

⁵ Kellogg v. Churchill, 1 W. L. M.

45; Kinyon v. Palmer, 20 Ia. 138.

⁶ Smith v. Hoover, 39 O. S. 249, 258.

⁷ Maholm v. Marshall, 29 O. S. 611; Mardsden v. Soper, 11 O. S. 505-6.

in the case on the ground of irregularities and defects. So motion made to dismiss an action for the reason that the court has no jurisdiction over the subject-matter of the action, has been held to be a waiver of defective service and a voluntary appearance.¹ And so with a motion to quash summons and return for improper service, filed by a railway company on the ground that the court had no jurisdiction of the case, as no part of its road passed through the county.² That a person may not submit himself to the jurisdiction of a court, he must appear for the sole purpose of objecting to jurisdiction of the court over the person, confining his objections to the mode or manner in which it has been so obtained, moving to quash the service. It is not then a waiver of any defect in the manner of obtaining the same.³ If, however, the motion involves the merits of the case made, the rule is otherwise.⁴

Sec. 119. Motion to quash summons and dismiss action for want of jurisdiction.—

Now comes the defendant C. E., not intending in any manner to enter his appearance herein, but for the sole purpose of protesting and objecting to the jurisdiction of this court over this defendant, therefore moves the court to quash the summons issued herein against this defendant for want of jurisdiction over the person of the defendant.

Sec. 120. Motion should specifically point out.—It is the duty of a party who asks relief by motion to specifically point out what he desires.⁵ It should indicate the part to which objection is made in such a manner that it may be ascertained.⁶ A motion to make definite and certain should point out the alleged defects.⁷

Sec. 121. To strike out.—Redundant, irrelevant or scurrilous matter inserted in a pleading may be stricken out on motion of the party prejudiced thereby; and so with obscene words, which may be stricken out by the court of its own motion.⁸ Redundancy consists of repetition, and irrelevancy has reference to matter which has no bearing upon the issues made. A plain and concise statement does not contemplate

¹ Elliott v. Lawhead, 43 O. S. 171; ⁵ Walker v. Morse, 33 Neb. 650.

Handy v. Insurance Co., 37 O. S. 366. ⁶ Jackson v. Bowles, 67 Mo. 609; O'Connor v. Koch, 56 Mo. 253.

² Railway Co. v. McLean, 1 O. C. C. 112. ⁷ Fisher v. Coons, 28 Neb. 400; 42 N. W. Rep. 417 (1889); Kerr v.

³ Smith v. Hoover, 39 O. S. 249; Reece, 27 Kan. 338.

Elliott v. Lawhead, 43 O. S. 171.

⁸ O. Code, sec. 5087; N. Y. Code,

⁴ Handy v. Insurance Co., *supra*; sec. 545. See Reichel v. Magrath, Maholm v. Marshall, 29 O. S. 611. L. R. 14 App. Cas. 665.

a long and prolix history of the cause of action.¹ If there is a semblance of a cause of action set forth in the petition, its sufficiency can not be determined upon a motion to strike out;² nor will such a motion be entertained after an answer or demurrer filed.³ If a motion is made to strike out matter which is material, it then partakes of the nature of a demurrer, and can not be entertained. It is not competent by motion to strike out averments in a petition material to the cause of action, and in this way defeat a right of recovery. Such matters must be met by answer.⁴ When a pleader becomes prolix and states more than is essential to his action, it becomes surplusage and falls under the head of irrelevant matter, and may properly be stricken out,⁵ or it may be disregarded by the court.⁶ A motion to strike out is addressed to the discretion of the court, and error can not be predicated thereon unless some substantial right has been jeopardized.⁷ This discretion, however, should usually be confined to cases where the mover will be prejudiced by the matter complained of.⁸ Among those matters which may be properly stricken out upon motion falling within the provision of the code under consideration are evidential facts⁹ or arguments.¹⁰ A motion to strike out certain allegations of fact stated by way of justification and mitigation, in an action for libel, can not be entertained, as both may be set up at the same time.¹¹ Nor can an entire answer be stricken out as redundant,¹² or specified defenses for uncertainty.¹³ Where one defense in an answer contains a general denial, a like denial embraced in other defenses may be stricken out.¹⁴ A motion to strike out a reply on the ground of departure, and a demurrer to it at the same time upon the same ground, is not proper; the motion may be stricken from the files.¹⁵ And where new matter in an amendment is intended as another or different cause of action against one defendant only, but is not

¹ *McGlothlin v. Hemery*, 44 Mo. 350.

² *Walter v. Fowler*, 85 N. Y. 621.

³ *Best v. Clyde*, 86 N. C. 4; *Russell v. Chambers*, 31 Minn. 54.

⁴ *Long v. Newhouse*, 57 O. S. 348, 367.

⁵ *Petty v. Trustees*, 95 Ind. 280.

⁶ *Ashe v. Gray*, 90 N. C. 137.

⁷ *Cogswell v. State*, 65 Ind. 1; *Cate v. Gilman*, 41 Iowa, 530; *Petree v. Brotherton*, 133 Ind. 692; 32 N. E. Rep. 300; *Long v. Newhouse*, 57 O. S. 348, 367.

⁸ *Boone's Pldg.*, sec. 249, note 13.

⁹ *Railroad Co. v. Bristol*, 26 Atl. Rep. 122 (Conn., 1893); *Bowen v. Aubrey*, 22 Cal. 566; *Wooden v. Strew*, 10 How. Pr. 48.

¹⁰ *Gould v. Williams*, 9 How. Pr. 51.

¹¹ *Van Ingen v. Newton*, 1 Disn. 458.

¹² *Fasnacht v. Stehn*, 53 Barb. 650.

¹³ *Smead v. Chrisfield*, 1 Disn. 17.

¹⁴ *Campen v. Murray*, 3 O. C. C. 93. See *Boone's Pldg.*, sec. 250, note 11.

¹⁵ *Laws v. Carrier*, 2 C. S. C. R. 80.

sufficient to constitute a cause of action, it may be stricken out.¹ A court may in its discretion order the plaintiff to so amend his petition as to strike out irrelevant and redundant allegations.² And a frivolous answer, demurrer or reply may be stricken out upon motion.³ A form of a motion of this character is very simple and may be as follows: Defendant now comes and moves the court to strike out of the petition as redundant and irrelevant the following, to wit.

Sec. 121a. Same—Answering after motion overruled.

—If a party who has filed a motion to strike out, answers the same matters that he moved to strike out, after the motion is overruled, he must be considered to have waived his right to have the action of the court upon the motion reviewed.⁴

Sec. 122. To strike from files.—There are instances in which courts have power to strike pleadings from the files upon motion, but such a motion can not be made to subserve the purposes of a general demurrer.⁵ It is most commonly employed in case of sham pleadings, which are those good in form but false in fact, and are not permitted under the code, the court having inherent power to strike them from the files.⁶ For example, a general denial which is false in fact may be stricken off as sham, and the court may hear evidence and determine whether it was filed in good faith or is false in fact.⁷ On the contrary it has been held that the pleading should *prima facie* show no defense or falsity;⁸ and that a pleading can not be declared frivolous where it requires argument so to do,⁹ and that this can not be done where it is verified or supported by affidavit.¹⁰ The right to object to the overruling of a motion to strike a pleading from the files is waived by pleading over.¹¹ A motion can not be made to strike a pleading from the files for any reason which affects the substance, but only upon the ground of some irregularity or form.¹² A pleading not filed within the prescribed time may be stricken from the files.¹³

¹ *Hawkins v. Furnace Co.*, 40 O. S. 507.

² *Drake v. Bank*, 33 Kan. 635.

³ *Bliss on Code Pldg.*, sec. 421.

⁴ *Williams v. Ry. Co.* 112 Mo. 463; *Walker v. Wear*, 42 S. W. Rep. 928 (Mo., 1897).

⁵ *Robinson v. Fitch*, 26 O. S. 659-62; *Ellis v. Reddin*, 12 Kan. 306. See chapter on Demurrer, sec. 109.

⁶ *Upton v. Kennedy*, 36 Neb. 66; *Wayland v. Tyson*, 45 N. Y. 281.

⁷ *Wertheimer v. Morse*, 23 W. L. B. 455. Questioned in *Werk v. Christie*, 9 O. C. C. 439. See *ante*, sec. 74.

⁸ *Upton v. Kennedy*, 36 Neb. 66; 53 N. W. Rep. 1042; *Cottrill v. Cramer*, 40 Wis. 559.

⁹ *Barney v. King*, 13 N. Y. S. 685.

¹⁰ *Bryant's Pldg.*, p. 200.

¹¹ *Shugart v. Pattee*, 37 Iowa, 422.

¹² *Finch v. Finch*, 10 O. S. 501.

¹³ *Acocock v. Halsey*, 90 Cal. 215; 27 Pac. Rep. 193 (1891).

Sec. 123. To make definite and certain.— When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.¹ The remedy for uncertainty and indefiniteness is by motion and not demurrer;² so that where the language of a pleading will fairly admit of a construction that will sustain it against a demurrer, it should, in the absence of a motion to make definite and certain, be so construed.³ Questions of the sufficiency of the averments in a pleading can only be raised by motion to make definite and certain or to strike out.⁴ Such a motion may reach a want of certainty as to time,⁵ ambiguity caused by alternative averments,⁶ or an allegation that an appraisal was not legally and duly made,⁷ or an allegation as to the title of a note sued upon,⁸ or the sufficiency of a reply.⁹ And while an allegation or denial of ownership is not a mere conclusion of law, yet as a statement of facts it may be indefinite and subject to motion.¹⁰ It must be clear to the court, however, that the pleading is uncertain before sustaining such a motion,¹¹ and the question cannot be raised for the first time on appeal.¹² Where two causes of action are set up, but not separately stated and numbered, a motion may be made to reach this irregularity.¹³ But it is entirely discretionary with the court as to whether the two causes shall be so separately stated and numbered, and its refusal to so order is not reviewable.¹⁴ While it is competent for a party to move to make a pleading of his adversary definite and certain, yet inasmuch as it is the primary duty of the party pleading to present a clear and unequivocal

¹ O. Code, sec. 5088.

² *Railway Co. v. Iron Co.*, 46 O. S. 44; *Lorrillard v. Clyde*, 86 N. Y. 384; *Roe v. Lincoln Co.*, 56 Wis. 66; *Trustees v. Odlin*, 8 O. S. 298; *Lewis v. Coulter*, 10 O. S. 451; *Bank v. Massillon*, 14 O. S. 208; 44 O. S. 55.

³ *Railway Co. v. Iron Co.*, *supra*.

⁴ *Pelton v. Bemis*, 44 O. S. 55, and cases cited.

⁵ *Railroad Co. v. Shanklin*, 94 Ind. 297.

⁶ *Jamison v. King*, 50 Cal. 182.

⁷ *Trustees v. Odlin*, 8 O. S. 298.

⁸ *Schrock v. Cleveland*, 29 O. S. 499.

⁹ *Whelan v. Kinssley*, 26 O. S. 181.

¹⁰ *Stoutenburg v. Lybrand*, 18 O. S. 228.

¹¹ *People v. Tweed*, 63 N. Y. 201.

¹² *Osborn v. Graves*, 11 Ore. 526.

¹³ See *ante*, sec. 20; *Township v. Bennett*, 10 O. S. 441.

¹⁴ *People v. Tweed*, 63 N. Y. 194.

statement of his allegations, the *onus* of having them so made cannot be cast upon his adversary by his own fault in failing to perform his duty.¹ The form of the motion may be: Now comes the defendant and moves the court for an order requiring the plaintiff to make his petition definite and certain, in this, to wit—stating the grounds with particularity.

Sec. 124. Other motions.—A defendant may at any time before the commencement of the trial file a motion to require a non-resident of the county in which the action is brought to give security for costs.²

Sec. 125. Notice of motion.—Notices of motions are usually regulated by rules of court. When required, it must be in writing, and contain the names of the parties or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day and hour on which it will be heard, the nature and terms of the order to be applied for, and must be served a reasonable length of time before the hearing.³ Parties are bound to take notice of all motions made in court and during the pendency of an action in the manner pointed out by the rules.⁴ Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct.⁵

Sec. 125a. Right to file motion waived how.—The rule is well settled that the right to file a motion to a pleading is waived by first filing a demurrer or answer.⁶ And if a demurrer has been sustained to the petition which is thereafter amended, a motion will not lie to the amended petition to matters which were in the original petition, but only to new matter therein. A party filing a motion must embrace therein all the grounds which he may have, otherwise he waives them, as the court does not sit to entertain successive motions to the same pleading.

¹ Clark v. Dillon, 97 N. Y. 374.

⁵ O. Code, sec. 5126.

² O. Code, secs. 5340–42, 5344.

⁶ Caldwell v. Brown, 9 O. C. C. 691;

³ O. Code, sec. 5123.

Gerard v. Gerard, 135 Ind. 15; State

⁴ Garner v. Cline, 2 W. L. M. 329.

v. Bath, 21 Kan. 583; Sheehan v.

As to service of motions, see O. Sims, 36 Mo. App. 224.

Code, secs. 5124, 5125.

CHAPTER 10.

AMENDMENTS, SUPPLEMENTAL PLEADINGS AND CONSOLIDATION OF ACTIONS.

<p>Sec. 126. Amendment of pleadings generally.</p> <p>127. Amendment changing action not allowed.</p> <p>128. Amendments—What and when made.</p> <p>129. Same—After demurrer sustained.</p> <p>130. Continuance after amendment.</p>	<p>Sec. 131. Amendment relates back.</p> <p>132. Amendment, how made.</p> <p>133. Supplemental pleadings.</p> <p>134. Same continued—Supplemental petition.</p> <p>135. Same continued—Supplemental answer.</p> <p>136. Immaterial errors.</p> <p>137. Consolidation of actions.</p>
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Sec. 126. Amendment of pleadings generally.—The law has always been favorable to amendments of pleadings. Even when made orally the pleader was not held to the form of statement first made, and so the idea descends to us under the code. It has been considered that the code confers almost unlimited power upon the court to permit amendment of pleadings in furtherance of justice,¹ but the time when they may be made is regulated by statute.² Amendments are permitted upon the theory that it is better to preserve and improve what has already been done than cast it aside. Important defects should be corrected as well as unimportant; those of substance as well as of form.³ Amendments may be made at the times prescribed by the code without leave. But at any other time an application for leave so to do must be made,⁴ and it rests largely in the discretion of the court.⁵ And pleadings filed out of time without leave or consent of court will be disregarded.⁶ A pleading which does not con-

¹ *Dressler v. Davis*, 13 Wis. 58; *Burtis v. Wait*, 33 Kan. 433; *Clark v. Clark*, 20 O. S. 128; *Bruck v. Bateman*, 25 O. S. 609; *Newburg Pet. Co. v. Weare*, 44 O. S. 610; *Ellison v. Railroad Co.*, *supra*.

² See sec. 128, *post*.

³ *Ellison v. Railroad Co.*, 87 Ga. 691.

⁴ *Tullos v. Lane*, 12 S. Rep. 508 (La., 1893).

⁵ *Stith v. Fullenwider*, 40 Kan. 73;

⁶ *Hopkins v. Cothran*, 17 Kan. 173.

tain a substantial cause of action is held not amendable in form;¹ nor should an amended petition which states no cause of action be allowed to be filed,² and it will be disregarded or stricken out as irrelevant.³ Amendments must not be made for delay but in good faith.⁴

Sec. 127. Amendment changing action not allowed.— It has been frequently asserted by the courts that an amendment cannot be permitted when a new or different cause of action is introduced;⁵ and this is the provision of the code, that is, the amendment must not substantially change the claim or defense.⁶ It does not refer to the form of the remedy, but only to the claim or defense.⁷ A cause of action which has accrued since the commencement of the action cannot be brought in.⁸ This must be by supplemental petition.⁹ An action upon a contract cannot be changed to one in tort,¹⁰ or from tort to contract.¹¹ Or an action on a fire insurance policy cannot be amended so as to make it an action upon a *parol* contract made after the issuance of the policy.¹² A new cause of action, however, is not added where the amendment merely adds a specification of further allegations of negligence and unskillfulness against a defendant.¹³ And so with an amendment showing that an injury occurred in a different manner from that alleged in the original petition.¹⁴ Or an action for damages resulting from the purchase of a horse may be amended to show an express warranty.¹⁵ And where an action has been brought upon an account the petition may be amended so as to bring in a note given in settlement thereof.¹⁶ The plaintiff may change the form of an action from an equitable one to a legal action, if the general identity of the transaction is maintained, and the claim is not substantially changed.¹⁷ The rule for-

¹ *Ellison v. Railroad Co.*, *supra*.

⁵ See sec. 133, *post*.

² *Rippe v. Stogdill*, 61 Wis. 38;
Hawkins v. Furnace Co., 40 O. S.
507.

¹⁰ *Link v. Jarvis*, 33 Pac. Rep. 206
(Cal., 1893).

⁸ *Hawkins v. Furnace Co.*, *supra*.

¹¹ *Cox v. Railroad Co.*, 87 Ga. 747;
Carmichael v. Argard, 52 Wis. 607.

⁴ *Ostrander v. Conkey*, 20 Hun, 421.

¹² *Hill v. Assurance Corp.*, 26 Abb.
N. C. 203.

⁶ *Shields v. Moore*, 2 W. L. M. 437;

Freeman v. Grant, 132 N. Y. 22;
Smead v. Chrisfield, 1 Handy, 573;
Hollister v. Livingston, 9 How. Pr.
140; *Reeder v. Sayre*, 70 N. Y. 181.

¹³ *Ehlein v. Brayton*, 21 N. Y. S. 825.
¹⁴ *Smith v. Bogenschutz*, 19 S. W.
Rep. 667 (Ky., 1892).

⁹ O. Code, sec. 5114.

¹⁵ *Culp v. Steere*, 47 Kan. 746.

⁷ *Poor v. Scanlan*, 7 W. L. B. 15.

¹⁶ *Roe v. Holbert*, 18 S. W. Rep. 417
(Tex., 1892). But see ch. 12, sec. —.

³ *Randall v. Christianson*, 51 N. W.
Rep. 253 (Iowa, 1892).

¹⁷ *Raymond v. R. R. Co.*, 57 O. S.
271; 39 W. L. B. 50.

merly was that amendments were not permitted where the purpose was to set up defenses which were termed unconscionable though legal, as usury, statute of limitations, or the like.¹ But this has been departed from somewhat and amendments are permitted without regard to the nature of the defense.² It is perfectly clear that a party may, so long as he is permitted to amend as of right, set up any kind of a defense; but, as suggested by Mr. Bliss, when it becomes discretionary with the court, it should be controlled by equitable considerations,³ and an unconscientious defense is not favored in equity.⁴ This may be correct in theory, but amendments are seldom refused in practice, and the rule adopted in the New York cases is that most generally followed. In an action for slander where the petition charges the words to have been spoken against the plaintiff individually, an amendment may be made by showing that they were spoken of him in his business.⁵ It may easily be determined whether the same evidence will support the original and amended petition,⁶ and if not, then the pleading cannot be considered an amendment.⁷ An action for money had and received cannot be changed to one for conversion,⁸ nor specific performance substituted for damages.⁹ But a petition for false imprisonment may be changed to one for malicious prosecution,¹⁰ and malicious prosecution to false imprisonment.¹¹ A new and different cause of action cannot be set up in an action on appeal.¹²

Sec. 128. Amendments — What and when made.— The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant

¹ Bliss on Code Pldg., sec. 431.

² *McQueen v. Babcock*, 22 How. Pr. 239. Usury may be set up. *Barnett v. Meyer*, 10 Hun, 109. It is held to be discretionary in Wisconsin. *Plumer v. Clark*, 59 Wis. 646; *Smith v. Dragert*, 61 Wis. 232. In *Treasurer v. Martin*, 50 O. S. 197, the court say that the statute of limitations is a meritorious defense, but where an unfair advantage has been taken so that it becomes an unconscionable defense it should not be allowed.

³ Bliss on Code Pldg., sec. 431.

⁴ *Treasurer v. Martin*, 50 O. S. 197.

⁵ *Shields v. Moore*, 2 W. L. M. 437.

⁶ *Scovill v. Glasner*, 79 Mo. 449; *Lumpkin v. Collier*, 69 Mo. 170.

⁷ *Scovill v. Glasner*, 79 Mo. 449.

⁸ *Kotch v. Sieplein*, 1 Clev. Rep. 17.

⁹ *Evens v. Hall*, 1 Handy, 434.

¹⁰ *Johnson v. Corrington*, 3 W. L. B. 1139.

¹¹ *Spice v. Steinruck*, 14 O. S. 218.

¹² *Grant v. Ludlow*, 8 O. S. 32; *Wilson v. Wilson*, 30 O. S. 365.

or his attorney; and the defendant shall have the same time to answer or demur thereto as to the original petition.¹ And at any time within ten days after a demurrer is filed, the adverse party may amend, without leave, on payment of costs since the filing of the defective pleading; and notice of filing an amended pleading must be forthwith served upon the other party, who shall have the same time thereafter to answer, or reply thereto, as to an original pleading.² When a demurrer is overruled, the demurrant may answer or reply, if the court is satisfied that he has a meritorious claim or defense and did not demur for delay.³ The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party,⁴ or by correcting a mistake in the name of a party,⁵ or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the facts proved; and when an action or proceeding fails to conform to the provisions of this title of the code, the court may permit the same to be made conformable thereto by amendment.⁶ Amendments under this provision rest entirely within the discretion of the court, and should be allowed at any stage of the trial in furtherance of justice.⁷ In fact it is considered the duty of the court to so allow the amendment.⁸ This, however is subject to the limitation that the cause of action must not be changed, nor cause delay, or be prejudicial to the defendant,⁹ nor should the amendment leave the cause of ac-

¹ O. Code, sec. 5111; *Quinlan v. Co. v. Wysong*, 8 O. C. C. 211, 212. Danford, 28 Kan. 507. amendment after verdict.

² O. Code, sec. 5112.

³ O. Code, sec. 5113; *Roose v. Perkins*, 9 Neb. 804, 810. ⁵ This does not substantially change the claim or defense. *Dewey v. McLain*, 7 Kan. 126.

⁴ *Liggett v. Ladd*, 28 Oreg. 26; 31 Pac. Rep. 81 (1892). The real party in interest may be substituted. *Clawson v. Cone*, 2 Handy, 67. As to adding or striking out the name of a party, see *Ansonia Rubber Co. v. Wolf*, 1 Handy, 236. As to amendment adding new parties, see *Liebmann v. McGraw*, 8 Wash. 520. See *Railway*

⁶ O. Code, sec. 5114.

⁷ *Railroad Co. v. Brown*, 20 Neb. 492; *Link v. Jarvis*, 38 Pac. Rep. 206 (Cal., 1898); *Guidery v. Green*, 95 Cal. 630; 30 Pac. Rep. 786; *Railway Co. v. Morgan*, 132 Ind. 430; 31 N. E. Rep. 661 (1892).

⁸ *Becker v. Walworth*, 45 O. S. 175.

⁹ *Hall v. Railway Co.*, 84 Iowa, 311; 51 N. W. Rep. 150 (1892).

tion incomplete.¹ Where justice requires it, an amendment may be made in the court of last resort² as well as upon appeal.³ The petition may be amended to conform to the proof;⁴ as, for instance, where the proof shows that the plaintiff had been run over, which the petition fails to state, it may be amended to meet the proof.⁵ An amendment may be made by inserting the time of payment of a note sued upon,⁶ or the dates when slanderous words were spoken may be inserted by amendment in an action for slander.⁷ And in an action on a contract the petition may be amended so as to claim the actual value of work done and materials furnished instead of the contract price as originally claimed.⁸ A new cause of action not inconsistent with the one originally stated may be set forth;⁹ or a petition claiming damages for a wrongful arrest may be amended by striking out the averment of "want of probable cause" and alleging that it was made illegally and with force;¹⁰ or matter may be more fully set out.¹¹ Additional material allegations which change the nature of the action may be inserted,¹² so long as the subject-matter of the action remains the same.¹³ Matters of description in a suit affecting realty may be changed;¹⁴ and so may some fact omitted in a petition essential to raise a duty involved in the action be supplied,¹⁵ or the prayer may be changed.¹⁶ But such an amendment will be unavailable unless the original petition contained a cause of action.¹⁷ It has been held that amend-

¹ *Ellison v. Railroad Co.*, 87 Ga. 691.

² *Humphries v. Spafford*, 14 Neb. 488, 490.

³ *Horton v. Horner*, 14 O. 437; *Grant v. Ludlow*, 8 O. S. 1; *Brock v. Bateman*, 25 O. S. 609; *Kilgore v. Emmett*, 33 O. S. 410.

⁴ *McWhinnie v. Martin*, 77 Wis. 182. See *Railway Co. v. Morgan*, 31 N. E. Rep. 661.

⁵ *Foley v. S. & T. Co.*, 85 Mich. 7.

⁶ *Tribune Pub. Co. v. Hamill*, 2 Colo. App. 237; 30 Pac. Rep. 137 (1892).

⁷ *Beneway v. Thorp*, 77 Mich. 181.

⁸ *School District v. Boyer*, 46 Kan. 54; 26 Pac. Rep. 484 (1891).

⁹ *Brown v. Leigh*, 49 N. Y. 78; *Sheldon v. Adams*, 41 Barb. 54.

¹⁰ *Spice v. Steinrock*, 14 O. S. 213.

A part of a cause of action may be withdrawn. *Watson v. Rushmore*, 15 Abb. Pr. 51.

¹¹ *Hintrager v. Richter*, 52 N. W. Rep. 188 (Iowa, 1892).

¹² *Railway Co. v. Salmon*, 14 Kan. 512.

¹³ *Baldock v. Atwood*, 21 Oreg. 73.

¹⁴ *Ward v. Parlin*, 30 Neb. 376; 46 N. W. Rep. 529 (1890). See *Frey v. Owens*, 27 Neb. 862.

¹⁵ *Ellison v. Railroad Co.*, 87 Ga. 691.

¹⁶ *Draper v. Moore*, 2 C. S. C. R. 167; *Getty v. Railroad Co.*, 6 How. Pr. 269; *Dawson v. Mighton*, 1 Clev. Rep. 115.

¹⁷ *Dawson v. Mighton*, *supra*.

ments may be made by reference to and adoption of specified portions of counts, and by adding thereto averments so as to constitute another separate count.¹ An amendment may be made for the purpose of explanation or more fully setting forth a cause of action.² Greater privileges are granted a defendant in respect to amendment. He may urge as many defenses as he may have, and he may change or add to them, and is restricted only to the extent that he should not be allowed to set up a new defense late in the action.³

Sec. 129. Same—After demurrer sustained.—If the demurrer to a pleading be sustained the adverse party may amend, if the defect can be remedied by amendment, as the discretion of the court may direct.⁴ But where leave to amend is not granted judgment may be rendered on the petition.⁵ And if a petition is amended after a demurrer is sustained all errors are thereby waived.⁶ And so with a defendant who files an amended answer after demurrer has been sustained to his original answer.⁷ A defendant is not entitled as a matter of right to demur anew to an amended pleading.⁸ And it cannot lie on the ground that it predicates its right to recover upon a fact which did not exist when the original petition was filed.⁹

Sec. 130. Continuance after amendment.—When either party amends a pleading or proceeding and the court is satisfied, by affidavit or otherwise, that the adverse party cannot be ready for trial in consequence thereof, a continuance may be granted to some day in term, or to another term of court.¹⁰ When an amended petition is filed as of right or within ten days after demurrer is filed, the defendant is entitled to the usual time in which to answer.¹¹ A court may properly refuse to admit an amendment which may necessi-

¹ Birmingham, etc. Ry. Co. v. Allen, 18 S. Rep. 8 (Ala., 1892). Pac. Rep. 386 (1892); Evans v. Insurance Co., 5 Ind. App. 198; 31 N. E. Rep. 843 (1892); Harris v. Railroad Co., 88 Va. 560 (1892).

² Valencia v. Couch, 32 Cal. 339; Stryker v. Bank, 28 How. Pr. 20.

³ Bryant on Code Pldg., sec. 230. See ante, sec. 78.

⁴ O. Code, sec. 5116.

⁵ Devoss v. Gray, 29 O. S. 159, 160.

⁶ Gale v. Tuolumne W. Co., 14 Cal. 26; Canceart v. Henry, 38 Pac. Rep. 92 (Cal., 1893).

⁷ Sylvester v. Craig, 18 Colo. 44; 31

⁸ Smith v. Dorn, 96 Cal. 73.

⁹ Null v. Jones, 5 Neb. 500. Only the amended pleading can be looked to. Id.

¹⁰ O. Code, sec. 5117.

¹¹ Mather v. Furnace Co., 1 W. L. M. 351. R. S., secs. 5111, 5112. See ante, sec. 67.

tate a continuance without abusing its discretionary powers.¹ Where delay is caused by an amendment to an answer the court may impose such terms as will compensate the plaintiff for any injury caused thereby.²

Sec. 131. Amendment relates back.—The amended pleading is substituted for and takes the place of the original;³ the latter of which is disregarded and the case tried upon the amended one, and no benefit can be derived from the original.⁴ The amended pleading or petition relates back to the commencement of the action, and the rights of the parties are determined as of that time; the statute of limitations ceases to run when the original petition is filed.⁵ But a party cannot bring in an omitted claim which has become barred by the statute of limitations since the filing of the original petition by an amendment, and have it relate back to the filing of the original petition so as to defeat the statute.⁶

Sec. 132. Amendment, how made.—Some courts have held it to be the settled and approved practice to make minor amendments, such as adding to or striking out the name of a party, correcting dates or obvious errors, by way of interlineation and erasure. But where new claims and demands are introduced, or allegations are added or stricken out, the pleading should be rewritten and the new matter set forth as in an original. It can not be done by mutilating or alter-

¹ *Skagit Ry., etc., v. Cole*, 2 Wash. 57.

² *Hills v. Ludwig*, 46 O. S. 373.

³ *Burns v. Scooffy*, 98 Cal. 271; 33 Pac. Rep. 86 (1893); *Griffin v. Same*, 33 Pac. Rep. 88 (Cal., 1893).

⁴ *Bank v. Telegraph Co.*, 30 O. S. 555; *Gillman v. Cosgrove*, 22 Cal. 356; *Brown v. Mining Co.*, 32 Kan. 528.

⁵ *Bank v. Telegraph Co.*, *supra*; *Smith v. Wigton*, 35 Neb. 460; 53 N. W. Rep. 374 (1892). An amended answer supersedes the first. *Reihl v. Likowski*, 33 Kan. 515.

⁶ *Barber v. Reynolds*, 33 Cal. 497; *Allen v. Marshall*, 34 Cal. 165; *Brown v. M. & S. Co.*, 32 Kan. 528; *Lorenzana v. Camarillo*, 45 Cal. 125; *Link v. Jarvis*, 33 Pac. Rep. 206 (Cal., 1893); *Miller v. Cook*, 25 N. E. Rep. 756 (Ill., 1890); *Wisner v. Ocum-paugh*, 71 N. Y. 113.

The court may strike such new barred claim or cause out upon motion. *Commissioners v. Andrews*, 18 O. S. 69. "An amendment of a complaint can not be allowed where to do so would deprive the defendant of the benefit of the statute of limitations, which could have been used against an original action." *Gillam v. Ins. Co.*, 28 S. E. Rep. 470 (N. C., 1892); *Roberts v. Ins. Co.*, 118 N. C. 420; *Gill v. Young*, 88 N. C. 56; *Chicago & A. R. Co. v. Scanlan*, 48 N. E. Rep. 826 (Ill., 1897). *Cf. Sherman Oil & C. Co. v. Stewart*, 42 S. W. 241 (Tex., 1897).

ing the files.¹ The rule as shown by the authorities in the note is believed not to be the universal one.² It is not in any event necessary to rewrite the entire pleading, but the amended part may be written upon separate paper, and allegations in the original pleading may be incorporated into the amended one by reference.³ The better and more orderly course, however, is to rewrite the original and incorporate the amendment in it.

Sec. 132a. Supplemental petition defined.—A supplemental petition or pleading is an additional petition or pleading, which states facts which have arisen since the filing of the original. It does not supersede the latter, but becomes a part thereof, and together constitute the petition in the action. If the original petition does not state a cause of action, a supplemental one can not be employed to aid the former in this respect, by setting up a right of action which did not exist at the time the original was filed.⁴

Sec. 133. Supplemental pleadings.—The right to file supplemental pleadings conferred by the code simply declares the

¹ *Hill v. Supervisor, etc.*, 10 O. S. 621. In *Missouri* it is held that it may be made by interlineation, even an averment of an additional demand. *South Joplin Land Co. v. Case*, 104 Mo. 572. See *Werborn v. Austin*, 8 S. Rep. 280; 82 Ala. 498; *Fitzpatrick v. Gebhart*, 7 Kan. 35, holding that it may be made by interlineation by writing on separate paper. If the amendment is short and scarcely if at all material, it is not an abuse of discretion to allow it to be made by interlineation. See *Simpson v. Greeley*, 8 Kan. 586.

² See *ante*, sec. 20; *Blank v. Morrison*, 1 Clev. Rep. 195.

³ *Mahaska County State Bank v. Crist*, 54 N. W. Rep. 450 (Ia., 1893); *Birmingham, etc., Ry. Co. v. Allen*, 13 S. Rep. 8 (Ala., 1892); *Eigenman v. Rockport, etc.*, 79 Ind. 41.

⁴ *Barker v. Prizer*, 48 N. E. 4 (Ind., 1897). *Musselman v. Mauley*, 42 Ind. 462; *Pouder v. Tate*, 132 Ind. 327.

Patterson, J., in *Lindenheim v. N. Y. El. R. Co.*, 50 N. Y. S. 886, a recent case, speaking of a supple-

mental petition says: "It is sought by this amended supplemental complaint to change again the whole nature of the action from one triable by jury—to restore it as one in equity, and to bring a new suit into the old one, upon a cause of action which did not exist when issue was joined in the original suit, and every detail of which, so far as the present plaintiff is concerned, is altogether extraneous of Ferber's right to institute the suit in the beginning.

"It is not the office of a supplemental complaint to accomplish that purpose. Such a pleading relates only to some matter germane to the original cause of action, and which has arisen since the previous pleading in the case, or of which the pleader was ignorant at the time that pleading was made. The terms of section 544 of the Code of Civil Procedure authorize the allowance of a supplemental complaint which alleges material facts which occurred after the former pleading, or of which the pleader was ignorant

law as it existed before,¹ and while it is so conferred by statute it is still largely discretionary with the court.² It can only be allowed on motion, but should not be permitted upon trial.³ It is provided that: Either party may be allowed, on such terms as to costs as the court, or a judge thereof, may prescribe, to file a supplemental petition, answer or reply,⁴ alleging facts material to the case which occur subsequent to the filing of the former petition, answer or reply; but reasonable notice of the application must be given when the court or judge so requires.⁵ It is almost a matter of course to allow a supplemental pleading to be filed, when the application is promptly made,⁶ though it should not be allowed upon an *ex parte* application.⁷ It is designed, not to supply omissions or defects, but to introduce facts that have transpired since the action was brought, to strengthen a cause of action or defense.⁸ Unlike an amended petition, a supplemental one never takes the place of an original; the issues joined in the original pleadings remain as issues to be tried, and as a general rule the supplemental petition does not state a cause of action.⁹ Upon the theory, therefore, that a supplemental petition is not an independent one, or complete in itself, but must be taken and

as above stated. The 'material facts' referred to in the section are facts connected with the cause of action asserted in the former pleading. They may be new matter, but can not be a new cause of action; that is to say, an entirely independent right, which had no previous existence, and no connection whatever with the pending suit. This view of a supplemental complaint was declared in *Bank v. Duryee*, 74 N. Y. 495, in which the court says: 'The new Code [referring to the Code of Civil Procedure] as well as the old, confines the complaint to a plain and concise statement of the facts constituting the cause of action, and there is no propriety in inserting in a supplemental complaint any new allegations other than those material to the cause of action.'

"There must be a relation in fact between the original cause of action as set out in the complaint and the new or other matter set up in a supplemental pleading. We do not mean to say that the court is without power, in a proper way, and on

a proper application, to amend pleadings, so that even a new cause of action might be declared upon, but to allow it to be done by supplemental pleading is not the proper way, especially in a case where the defendants' rights might be very much impaired, and when the plaintiff may bring a separate action, if she has an enforceable cause of action."

¹ *Spears v. Mayor*, 72 N. Y. 442.

² *Medbury v. Swan*, 46 N. Y. 200; *Smith v. Smith*, 22 Kan. 609; *Harding v. Minear*, 54 Cal. 699.

³ *Lyon v. Isett*, 42 How. Pr. 155.

⁴ *Ormsbee v. Brown*, 50 Barb. 436.

⁵ O. Code, sec. 5119.

⁶ *Sage v. Mosher*, 17 How. Pr. 367.

⁷ *Fleischman v. Bennett*, 79 N. Y. 579.

⁸ *Nave v. Adams*, 107 Mo. 414-15; *Dillman v. Dillman*, 90 Ind. 585; *Porter v. Wills*, 6 Kan. 453; *Gibbon v. Dougherty*, 10 O. S. 385.

⁹ *Myers v. Met. El. Ry.*, 12 N. Y. S. 2; *Hayward v. Hood*, 44 Hun, 129; *Farmers' L. & T. Co., etc., v. Tel. Co.*, 47 Hun, 315.

considered with the original, to constitute a petition, a demurrer, therefore, should not be filed to the supplemental pleading, as it is not authorized by the code. This view is adopted by a number of authorities.¹ A defendant may also be permitted to file a supplemental answer,² and the plaintiff a supplemental reply.³ The course pursued to obtain leave to file a supplemental pleading is to file a motion for that purpose, which is generally supported only by professional statements of counsel. The name of a pleading is not controlling, and if one be styled supplemental but contain facts which should properly be in an amended petition, it will be so treated.⁴ To avoid repetition it may be made a part of the original petition by reference.⁵

Sec. 134. Same continued—Supplemental petition.—A new cause of action or claim which has accrued since the filing of the original petition, and upon which recovery may be had without regard to the cause of action stated in the latter,⁶ can not be set up in a supplemental petition, nor can one to which the plaintiff was not entitled when he commenced his action.⁷ As already stated,⁸ only those rights which have accrued subsequently to the filing of a petition,⁹ as title acquired after suit is brought, may be set up;¹⁰ or a suit may be continued by supplemental pleading against a representative of a deceased party;¹¹ or to include a note falling due during pendency of foreclosure proceedings;¹² or it may not only insist upon relief already prayed for, or upon different relief when facts occurring since may require it;¹³ and by stockholders seeking to enforce a contingent liability of other stockholders who have assigned their stock;¹⁴ or new parties defendant who have become liable since the filing of the action may thus be brought in.¹⁵ A wholly defective petition, however, can not be amended by filing a supplemental petition founded upon matters which have subsequently taken place.¹⁶

¹ *Myers v. Met. El. Ry.*, 12 N. Y. S. 2; *Lewis v. Rowland*, 30 N. E. Rep. 796; 131 Ind. 37 (1892); *Peters v. Banta*, 120 Ind. 416; *Farris v. Jones*, 112 Ind. 498.

² *Hoyt v. Sheldon*, 4 Abb. Pr. 59.

³ *Ormsbee v. Brown*, 50 Barb. 436.

⁴ *Cincinnati v. Cameron*, 33 O. S. 336; *Raymond v. R. R. Co.*, 57 O. S. 271. See *Miller v. Cook*, 135 Ill. 192; *Lewis v. Rowland*, 131 Ind. 37.

⁵ *Gibbon v. Dougherty*, 10 O. S. 365.

⁶ *Milner v. Milner*, 2 Edw. Ch. 114; *Watson v. Thibou*, 17 Abb. Pr. 184; *Barker v. Prizer*, 48 N. E. Rep. 4 Ind., 1897.

⁷ *Tiffany v. Bowerman*, 2 Hun, 643; *Farmers', etc., Trust Co. v. Telegraph Co.*, 47 Hun, 315.

⁸ *Ante*, sec. 133.

⁹ *Porter v. Wells*, 6 Kan. 453.

¹⁰ *Moon v. Johnson*, 14 S. C. 434.

¹¹ *Carter v. Jennings*, 24 O. S. 182.

¹² *Glenn v. Hoffman*, 2 W. L. M. 599.

¹³ *Miller v. Cook*, 135 Ill. 192.

¹⁴ *Kilgrus v. St. Ry. Co.*, 8 W. L. B. 23.

¹⁵ *Prouty v. Railroad Co.*, 85 N. Y. 272.

¹⁶ *Miller v. Cook*, 135 Ill. 193.

Sec. 135. Same continued — Supplemental answer.— A defendant is given more latitude than is the plaintiff in reference to filing supplemental answers. A supplemental answer takes the place of the plea *puis darreign* continuance at common law, and must be pleaded before the next continuance, after the facts or events have occurred and become known.¹ That a defendant may file such an answer as a matter of right, the proposed plea must be true and a good defense.² He may introduce matters of defense which existed at the time of filing his original answer but of which he was ignorant;³ or title acquired during the pendency of the suit, and other matters subsequently arising,⁴ if material to the defense,⁵ though as a rule a technical defense should not be allowed to be filed after time to answer has expired.⁶ Although the right to file a supplemental answer is in a measure discretionary,⁷ yet if the facts set forth make a perfect defense, it becomes the duty of the court to admit it.⁸

Sec. 136. Immaterial errors.— The code requires that in every stage the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed by reason of such error or defect.⁹ This provision has reference to motions to amend,¹⁰ or other motions touching formal matters,¹¹ and unless there has been an abuse of discretion the ruling of the court thereon cannot be disturbed.

Sec. 137. Consolidation of actions.— When two or more actions are pending in the same court, the defendant may, on motion, and notice to the adverse party, require him to show cause why the same shall not be consolidated; and if it appear that, at the time the motion is made, the actions could have been joined, and if the court find that they ought to be joined, the several actions shall be consolidated.¹² The whole question

¹ *Tilton v. Morgaridge*, 12 O. S. 104. *Tefft v. Tiery*, 22 Kan. 758; *Spears v.*

² *Morel v. Garely*, 16 Abb. Pr. 269. *Mayor*, 72 N. Y. 442.

³ *Hoyt v. Sheldon*, 4 Abb. Pr. 59.

⁴ *Drough v. Curtis*, 8 How. Pr. 56.

⁵ *Moss v. Shear*, 30 Cal. 467.

⁶ O. Code, sec. 5115.

⁷ *Radley v. Houghtaling*, 4 How. Pr. 251; *Lyon v. Isett*, 42 How. Pr. 155.

⁸ *Hoyt v. Sheldon*, 4 Abb. Pr. 59.

⁹ *Fitzgerald v. Neustadt*, 91 Cal. 600; 27 Pac. Rep. 936; *Rogers v. Hodgson*, 46 Kan. 276.

¹⁰ *Medbury v. Swan*, 46 N. Y. 200;

¹¹ *Bear v. Knowles*, 36 O. S. 43.

¹² O. Code, sec. 5120.

under this provision hinges on the fact whether the two cases may properly be joined.¹ And the power to order a consolidation exists independently of statute.² Where actions brought by different parties are consolidated without change in the pleadings, the petition of one plaintiff cannot aid that of another of which it is no part,³ and the original actions are discontinued, the consolidated one only remaining.⁴ An action for services may be consolidated with one for breach of contract of sale;⁵ or several actions in ejectment;⁶ or a separate suit upon a note with one upon the mortgage securing it may be consolidated.⁷ The object of consolidation is to prevent a multiplicity of suits and to save costs.

¹ *Newberry v. Alexander*, 44 O. S. 346.

⁴ *Hiscox v. N. Y. S. Zeitung*, 28 N. Y. S. 682.

² *Patterson v. Eakin*, 87 Va. 49; 13 S. E. Rep. 144 (1890).

⁵ *Grant v. Davis*, 31 N. E. Rep. 587 (Ind. App., 1892).

³ *Hinckley v. Pfister*, 83 Wis. 64.

⁶ *Jackson v. Stiles*, 5 Cow. 282.

⁷ *Howlett v. Martin*, 3 W. L. G. 206.

CHAPTER 10-A.

MODE OF TRIAL UNDER THE CODE.

Sec. 137-1. Mode of trial has not been changed — The code provisions.

137-2. Four difficulties in deciding upon mode of trial.

137-3. 1st Difficulty — Where legal and equitable cause of action are united.

137-4. 2d Difficulty — Single cause of action calling for both legal and equitable relief.

Sec. 137-5. Foreclosure suits separately classified — Limitations upon paramount relief rule.

137-6. 3d Difficulty. Where it is difficult to determine whether or not the cause of action is legal or equitable.

137-7. 4th Difficulty. Legal or equitable defense, counter-claim or set-off which extinguishes plaintiff's cause of action.

Sec. 137-1. Mode of trial has not been changed—The code provisions.—The mode of trial formerly prevailing in the two classes of actions in law and equity was a matter which the code commissioners had to consider and provide for in the preparation of the code. And an explanation of this matter should be made in connection with the forms of action. We should be thoroughly familiar with the provisions of the code with reference to it. The forms of action have been abolished, and it has been provided that those actions which were formerly administered by separate and independent tribunals may now be united without changing the method of trial as it existed formerly. All actions falling under the provisions of the code¹ which enumerates in what cases the right of trial by jury shall be had, are exactly the same as they formerly were, to wit: the old common-law actions—*assumpsit*, debt, covenant, replevin, ejectment, etc.

Issues in all other cases, or all other issues, are tried to the court.²

Sec. 137-2. Four difficulties in deciding upon mode of trial.—The right to trial by jury was not thus impaired, as that could not be done, but it was secured in some cases where it was

¹ 5130.

² Code, sec. 5131.

not before enjoyed. The question as to what issues shall be tried to a jury and what shall not is sometimes troublesome to practitioners. The only inconvenience which has been caused by the consolidation of law and equity is in deciding upon the mode of trial. Although the distinction between law and equity has been uniformly maintained,¹ and, although actions at law and equity are tried in the same court, the method of trial in the two classes of actions is as distinct as before the consolidation. The confusion and difficulty comes about (1) by reason of allowing the union of legal and equitable causes in the same petition, and (2) where the facts constituting a single cause of action call for two kinds of relief, legal and equitable, or (3) where it is difficult to determine whether or not the cause of action alleged is purely equitable or of a legal character. And there is a (4th) difficulty in a class of cases where the cause of action is itself either legal or equitable, but facts are alleged by the defendant, which, if substantiated, extinguish plaintiff's cause of action, so that the only judgment that can be rendered is either legal or equitable, and directly contrary to plaintiff's cause of action.

We will take up these difficulties in the order named and see if we can solve them satisfactorily, and determine the method of trial in all cases. We call them difficulties because the courts have decided the cases before them, with a view only to the facts, and have nowhere undertaken to distinguish and harmonize them. It is likewise generally regarded as a difficult question, and is a bone of contention in many instances.

If our courts would review all cases of their own state on a kindred subject in their opinions, distinguish or overrule and harmonize them when necessary, great service would be rendered, and we might not then encounter these difficulties. Law is a science, any branch of which should be considered as an entirety. There is danger of separation between the circumstances of a particular case and the general principle, or of narrowing the consideration of questions to a particular case rather than looking to see how the decision is going to fit in and coincide with the general principles already established. After having gone over all of the cases in Ohio touching this subject very carefully, the author finds them all harmonious, and has endeavored to do what no one has, so far as he is aware, discuss the subject as an entirety.

Sec. 137-3. 1st Difficulty—Where legal and equitable cause of action are united.—1. If a legal or an equitable cause of action are united in one petition, what is the method of trial?

¹ *Ante*, sec. f.

Causes of action, it will be remembered, can not be united unless they arise out of the same transaction, or unless they fall within some of the enumerated classes, so that we can thus see that the causes of action are not strangers to each other; they either arise out of the same transaction or sustain some other close relation. But this does not aid in determining the method of trial.

If a legal and an equitable cause of action be united in the same petition, the parties have an absolute right to demand a trial by jury of the issues of fact in the legal cause of action, which can not be taken away or abridged by the legislature.¹

We are led to inquire, if the foregoing statement be correct, what is gained by joinder of such causes of action in one petition, if there has to be a separate trial for each cause of action? Parties may, and usually do, agree that the two causes will be tried together and at once. But even though they do not agree, the court is authorized by the code² to order any issue in an equitable action to be tried by a jury, and if the parties demand a trial by jury upon the issues of fact in the legal cause of action, the court may then refer the whole case to the jury.

In cases where there are two causes of action united in one petition, in the foreclosure of liens, at least, where it is not sought to enforce the legal cause of action only so far as it is necessary to enforce the equitable cause of action, the rule which is logically applicable to single causes of action calling for two kinds of relief that the nature of the action and the consequent method of trial, is determined by the paramount relief asked, may be applied. But it is doubtful whether this rule should be applied to any other class of cases where there are two causes united, unless the granting of relief upon one or the other causes of action depends upon

¹ Rowland v. Entrekin, 27 O.S. 47. (The relief in this case invoked the equity powers of the court. Plaintiff sought the reformation and perfection of a lease defectively executed. Scott, J., said: "The case is to be distinguished from one in which a plaintiff unites in the same action causes for equitable relief, and an independent cause of action for the recovery of money only, in regard to which, if issues of fact be joined, a jury may of right be demanded for their trial.")

Ladd v. James, 10 O.S. 438. (This was a cause of action for personal judgment on the note, and foreclosure. The Court said: "Where an action is brought upon a note and on a mortgage given to secure its payment, and a judgment is asked upon the note, and for the sale of the mortgaged property, any issue of fact which affects the judgment upon the note is an issue which either party has a right to demand that it shall be tried by a jury.")

² Sec. 5131.

whether or not relief is granted on the other. If reformation of an instrument and for judgment thereon as reformed be considered as two causes of action, which in the opinion of the author it is,¹ and which finds some support, but is not generally so considered, it would furnish a proper case for the application of this rule.

This branch of the subject will be left by the author with the statement that, if two causes of action be encountered, one of which is incidental to the other, then the rule that the method of trial is governed by what is the paramount relief applies.

Sec. 137-4. 2d Difficulty—Single cause of action calling for both legal and equitable relief—Paramount relief rule.—Where the facts constituting a single cause of action call for both legal and equitable relief, the method of trial in such cases is determined by the nature of the action. In all such cases one kind of relief will be primary or paramount and the other will be incidental. If the primary or paramount relief be equitable, and the legal relief is only incidental, that is, if it is necessary to determine whether plaintiff is entitled to the equitable before the legal relief can be granted, then it is an equitable action, and triable to the court without a jury. And if paramount relief is legal and the equitable relief only incidental, it is a jury case. An extended review of cases supporting this proposition is made in the note.²

¹ See sec. 47, *ante*.

² *Ellsworth v. Holcomb*, 28 O. S. 66. (Was a single cause of action for reformation of a contract, and at the same time asking for a money judgment. Held not a jury case.) *Rowland v. Entrekin*, 27 O. S. 47. (Was a single cause of action for reformation of lease and for damages. Held not a jury case.) *Brundridge v. Goodlove*, 30 O. S. 374 (was a single cause of action for breach of contract, damages, and to restrain defendant from further violation and praying for perpetual injunction. Held, That the action, though equitable relief was sought, being primarily for money and personal judgment, it was a jury case.) *Chapman v. Lee*, 45 O. S. 356.

(This case was held to state primarily a legal cause of action, and an accounting only incidentally, and supports the text. It was a charge of fraudulent combination between the defendants, whereby the plaintiffs were deceived, and asking to have a lien under a contract enforced, and for judgment upon an accounting for money, etc. It would seem that the paramount relief certainly was equitable, because the amount of money for which judgment was finally to be rendered was uncertain until an accounting was had.)

Averill Coal & C. C. Co. v. Verner, 22 O. S. 372. (Was an action for balance due on contract for services, and for money loaned, and involved numerous items and accounts. Held

Sec. 137-5. Foreclosure suits separately classified—Limitations upon paramount relief rule.—Foreclosure proceedings should probably be separately classified, for in such an action there are two causes of action, and not a single cause of action calling for two kinds of relief. The rule that the paramount relief determines the nature of the action and the mode of trial, should, in the opinion of the author, ordinarily be limited to single causes of action calling for double relief, but it may apply to foreclosure when no personal judgment is asked. It is doubtful whether any other action containing two causes of different nature can be compared to foreclosure of liens—mortgage—mechanics and vendors. When no personal judgment is asked, the only object of the case is the enforcement of the lien, and the legal cause of action is truly then only incidental to the equitable one, and the cause should be tried to the court. When personal judgment is asked in foreclosure, it must be treated as an action for money only,¹ in which the parties are entitled to trial by jury upon the issues of fact arising therein.² There is another question of considerable importance which has been brought in question frequently in Ohio in foreclosure cases, namely, how such actions shall be tried when a defense is interposed which is legal in its nature, while the action is purely equitable, no personal judgment being asked. This will be discussed separately at another place, as the 4th difficulty in the method of trial.³

a jury case, notwithstanding the complicated accounts.)

Fleming v. Kerkendall, 31 O. S. 568. The prayer of the petition was: "That said mortgage may be foreclosed, the premises ordered to be sold, and the proceeds applied to the payment of the debt, and execution awarded for the balance, and for a personal judgment against John Fleming." The defendant, K., was a subsequent purchaser of the mortgaged premises, and did not assume the debt to plaintiff, and the only object of the suit against him was to foreclose his equity of redemption by the sale of the property. K., the defendant, answered, setting up payment of the indebtedness by the original owner. This, if true, would have ended the

case and the right to foreclose, but the court held that the controversy between the present owner and the plaintiff was of an equitable nature, and that the prayer for personal judgment against the original owner was merely incidental to the principal relief sought. The plea of payment is merely a *defense*, and does not affect or change the mode of trial. See sec. 137-7, *post*.

Alsdorf v. Reed, 45 O. S. 653 (was a suit upon a note and for foreclosure, in which personal judgment was not asked.

¹ R. S., sec. 5030.

² *Ladd v. James*, 10 O. S. 438.

³ See sec. 137-7, *post*. See, also, sec. 586, where trial in foreclosure is fully discussed and the authorities collected.

Sec. 137-6. 3d Difficulty—Where it is difficult to determine whether or not the cause of action is legal or equitable.—There is a class of cases where the facts constituting a cause of action are of such a nature that it is difficult to determine whether they call for legal or equitable relief. These cases lie “near the vague and indefinite boundary-line between the jurisdiction of courts of law and equity. The books abound in cases lying near this line on either side, where unsuccessful attempts have been made to define, with some degree of precision, the limits of equity jurisdiction.”¹ Under our system of pleading it is required that plaintiff shall allege the *facts* relied upon to sustain the cause of action sought to be enforced, with a demand for the judgment to which the plaintiff was entitled, and it is sometimes difficult to determine whether or not the cause of action alleged is one purely equitable or purely of a legal character.

At common law the form of the action always determined its character; under the code the character of an action, that is, whether it is a legal or an equitable action, is determined solely by whether or not the facts entitle plaintiff to legal or equitable relief; and the court will determine this matter entirely from the facts alleged without regard to the demand for relief, provided the facts are clear and unambiguous. The general rule, therefore, for the determination of the nature of an action and how it shall be tried, is by the nature or character of relief sought, or to which plaintiff is entitled.² This rule will govern causes where there is only one cause of action involved which calls for only one kind of relief. But when the facts constituting a single cause of action entitle the party to both legal and equitable relief, then the rule that the nature of the action is governed by the paramount relief demanded, or to which plaintiff is entitled, applies.

It is a general rule that the prayer of the petition is not looked

¹ *Culver v. Rodgers*, 33 O. S. 541.

² *Gunsaulius v. Petit*, 46 O. S. 27. (“The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only, the fact that before the adoption of our reformed system of procedure the proper remedy would have been by

assuit in equity, does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings.”) See *Huber v. Huber*, 10 O. 371; *Alsdorf v. Reed*, 45 O. S. 653; *Black v. Boyd*, 50 O. S. 46; *Chapman v. Lee*, 45 O. S. 356; *Bricker v. Elliott*, 55 O. S. 577; *Avery v. Vansickle*, 35 O. S. 273, 274; *Corry v. Gaynor*, 21 O. S. 277; *Jenks v. Langdon*, 21 O. S. 362.

to in determining the character of the action.¹ But the prayer, while no part of the cause of action, is nevertheless part of the petition, and may frequently be resorted to in order to determine the character of the action.² Where the facts stated entitle plaintiff to either of two remedies, he may elect the one or the other by his prayer for relief and thereby determine the character of the action.³ So where the facts would entitle the party to either legal or equitable relief, or where the facts alleged render the character of the action ambiguous and doubtful, the prayer will solve the doubt and determine the character of the action.⁴

Sec. 137-7. 4th Difficulty—Legal or equitable defense, counter-claim or set-off, which extinguishes plaintiff's cause of action.—Where the cause of action is itself either legal or equitable, but facts are alleged by the defendant which, if substantiated, extinguishes plaintiff's cause of action.

This difficulty is the most serious. The author reluctantly undertakes to solve it, and to harmonize the authorities relating to it, because *it is difficult*. But the problem can and must be solved logically and correctly.

The question is, where plaintiff has set up a single cause of action asking for either legal or equitable relief, as the case may be, or if he has set forth two causes of action in one complaint, in either of which cases the defendant answers, setting up a defense asking for relief directly opposed to that sought by plaintiff in the single cause of action, and directly opposed to one kind of relief asked in the case where two causes of action are set forth, how are the issues of fact to be tried? To state it more exactly: Plaintiff sets up a legal cause of action, as recovery of the possession of real property. Defendant answers, setting up some equitable defense, as a contract, asking specific performance. If the defendant's contention be correct, he is entitled to the possession of the property, and to get it is entitled to equitable intervention. If the defendant's position is right, a jury could not settle the matter, but a court of equity would have to decide who was entitled to possession, and decree specific performance. A case of similar character has been decided, where the defendant aban-

¹ *Miesse v. Loren*, 5 O. N. P. 307;
O'Brien v. Fitzgerald, 143 N. Y. 381;
 1 *Encyc. Pl. and Pr.* 146; *Corry v.*
Gaynor, 21 O. S. 277; *Jenks v.*
Langdon, 21 O. S. 362; *Avery v.*
Vansickle, 35 O. S. 274.

² *Reed v. Reed*, 25 O. S. 422.

³ *O'Brien v. Fitzgerald*, 143 N. Y.
 377, 382; *Hun v. Cary*, 82 N. Y. 66;
Miesse v. Loren, 5 O. N. P. 307;
 1 *Encyc. Pl. and Pr.* 147.

⁴ *O'Brien v. Fitzgerald*, 143 N. Y.
 307.

doned his claim for specific performance, and the issue was then narrowed down to the right of possession, and the answer then only amounted to a defense, and the case was referred to a jury, and properly so.¹ In arriving at a proper conclusion of this question we must be guided by the code; and the solution of this 4th difficulty involves a construction of the code governing trials, and also of the section relating to the contents of the answer. When this is properly done, all of the cases touching the subject can be harmonized. "Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury,"² is the provision of the code.

Note the fact that it is issues of fact arising in *actions*. In an *action* for the recovery of money where the defendant interposes a *defense merely, which is only a defense*—whether legal or equitable—and *is not the subject of an independent cause of action by defendant against the plaintiff*, the *action* by plaintiff will still remain one for the recovery of money only, and the issues of fact arising therein must be tried by the jury, notwithstanding the fact that the defense of defendant calls for equitable relief, and if substantiated will extinguish plaintiff's claim. Advantage can be taken of the statute authorizing trial by jury, either by plaintiff or defendant, only when either are prosecuting an action or something which is or may be the subject of an action; that is, when the defendant is asking for affirmative relief upon a cause of action against plaintiff. Let us see whether or not the soundness of the foregoing statement can not be practically demonstrated.

An action is brought by plaintiff in which there are two causes of action, one upon a note, the other to foreclose a mortgage securing the same, personal judgment not being asked. It is not then to be treated as a civil action for the recovery of money only,³ the paramount relief is equitable in its nature, and the case triable to the court. A defense is interposed to such action which goes merely to the cause of action upon the note, which is legal, such as absolute and full payment. If it is paid then plaintiff has no right to foreclose, it is true. But does this defense, which could not be the subject of an action, change the nature of the action, requiring a different method of trial? No; the action remains the same, and trial must be had to the court

¹ Smith v. Anderson, 20 O. S. 76. (The court said: "The fact that the defense was an equitable one, and that the defendant prayed affirmative action by the court in her be-

half, does not alter the case." But this case is distinguished in Buckner v. Mear, 26 O. S. 519.

² Code, sec. 5130.

³ R. S. sec. 5021.

without a jury, and if it be decided that the plaintiff is not entitled to maintain his cause of action for equitable relief, it becomes the duty of the court to dismiss the action. This reasoning explains one line of decisions satisfactorily, and establishes the rule that where the cause of action is purely equitable or purely legal, and the defense set up by the defendant is of such a nature that, though if true, it will extinguish plaintiff's claim, still it is not of such a nature that it will or could be the subject of an independent cause of action against the plaintiff, or if defendant only insists upon it as a defense, issues of fact involved in the action are triable to the court without a jury. The matter set up by the defendant in such case can not be said to fall within the provisions of the code, providing that "issues of fact arising in actions for the recovery of money only, etc.," shall be tried by a jury.

The cases supporting what has been stated are given in the note.¹ Where, however, a petition states facts which would constitute a cause of action, either at law or in equity, and where, upon the trial before a court of equity, it appears that the plaintiff is not entitled to equitable relief, the court may then, in certain cases, retain the action, so that it may be tried as an action at law to enforce the legal cause of action which the facts alleged in the petition show to exist in favor of plaintiff.²

Where plaintiff has set forth in his petition a cause of action for the recovery of money only, or for the specific recovery of real or personal property, in which issues of fact are triable to a jury, and the defendant alleges new matter in his answer constituting an equitable *cause of action*, which, if established, extinguishes or supersedes the case made in the petition, the issues taken on such new matter are triable by the court, and not as of right by a jury. This new matter constituting an *equitable cause of action* may or may not controvert the cause of action of the plaintiff. If the cause of action stated in the petition is admitted, then it does not controvert the cause of action set forth by plaintiff, and *there are then no issues raised* with respect to the cause of action set forth by plaintiff. The only issues of fact that can be raised then, are the issues of fact raised by the new matter set forth by the defendant, which may be legal or equitable accord-

¹ *Alsdorf v. Reed*, 45 O. S. 653, (plea of payment made); *Toplitz v. Bauer*, 49 N. Y. S. 840 (Sup. Ct., 1898); *The C. S. & L. Assn. v. Kreitz*, 41 O. S. 143. (In taking an

account to ascertain how much of the mortgage debt remained unpaid, a jury trial can not be had.)

² *Toplitz v. Bauer*, 49 N. Y. S. 840, 846.

ing to circumstances. This is clearly distinguishable from new matter which constitutes only a defense, and which does directly controvert the issues raised in plaintiff's petition. But if the new matter set up by defendant is such matter as constitutes an equitable or a legal cause of action against the plaintiff, does take issue with the averments of the petition, the materiality of such issue will depend upon the result of the trial of the equitable case or the legal case made by the defendant. If the equitable or legal cause of the defendant should be established, the decree would end the whole controversy and settle the rights of the parties. But if the defendant should fail in his equitable or legal case, the issues raised by the petition would have to be disposed of before the case could pass to final judgment. The matter thus set up by the defendant, which constitutes either a legal or an equitable cause of action against plaintiff, will be either a *counter-claim* or a *set-off*—which, under the code,¹ he is allowed to set up.

That a counter-claim or set-off may be equitable as well as legal, is explained elsewhere.²

If it be only a legal or equitable defense, no affirmative relief being asked, the mode of trial is governed by the nature of plaintiff's cause of action.

If affirmative relief is asked, whether legal or equitable, it is then either a counter-claim or set-off,³ which must be first tried before the plaintiff's cause.

The rules governing the pleading of counter-claims must be kept in mind and must be complied with. They are discussed elsewhere.⁴ The new matter thus set up, which may constitute a counter-claim or a set-off, to entitle the defendant to trial by the jury, or to the court independently of the plaintiff's cause of action, must be complete in itself, such as would entitle the defendant to a judgment or decree in a separate action.⁵

And where the defendant has complied with these rules, and has set up a complete cause of action against the plaintiff with the same distinctness and certainty as he would if he were setting it up in a petition,⁶ he is then entitled to have the same

¹ R. S., sec. 5070.

² Sec. 74-3, *ante*.

³ Pomeroy's Code Rem. sec. 91; Currie v. Cowles, 6 Bosw. 452; Wemple v. Stewart, 22 Barb. 54; Russell v. Conway, 11 Cal. 93; Burton v. Willin, 6 Houston, 522.

⁴ See secs. 82, 84, *post*.

⁵ Hill v. Butler, 6 O. S. 207; Mogle v. Black, 5 O. C. C. 51, 52. See sec. 81, *post*; Bank v. Weyand, 30 O. S. 128.

⁶ Dale v. Hannerman, 12 Neb. 221.

tried, even though the plaintiff may have dismissed his action or failed to appear.¹

Therefore, from this reasoning and argument, we can see how the new facts set up by the defendant, not by way of defense merely, but constituting, in fact, a cause of action against plaintiff, either legal or equitable, either by way of counter-claim or set-off, fall within the provisions of the code requiring the trial of issues of fact in actions for the recovery of money only, or of specific real or personal property to a jury,² and all other issues of fact to the court.³ This new matter really and in fact constitutes an action, although set up in an answer and cross-petition, and, as already stated, may as of right be tried independently of plaintiff's cause of action.

The cases which enunciate the doctrine and principles last stated, and which we have already shown to be clearly distinguishable from the other line of cases where only a defense not constituting a complete cause of action against plaintiff is set up, are cited in the note.⁴

¹ See sec. 83, *post*; *Bank v. Weyand*, 30 O. S. 126.

² R. S., sec. 5130.

³ R. S., sec. 5131.

⁴ *Buckner v. Mear*, 26 O. S. 514. (Was an action for breach of covenant—a legal cause of action. Defendant denied eviction, and in a counter-claim set up an equitable cause of action against plaintiff.)

Salladay v. Webb, 2 O. C. C. 553. (Plaintiff's cause was a purely equitable foreclosure. The defense admitted plaintiff's cause of action, but set up a counter-claim by way of damages—a legal cause of action.) *Toplitz v. Bauer*, 49 N. Y. S. 840. *Massie v. Stradford*, 17 O. S. 597. (Was an action for trespass. Defense set up equitable defense.)

CHAPTER 10-B.

VARIANCE—ALLEGATIONS AND PROOFS MUST CORRESPOND.

Sec. 137-8. Variance—Does it come under pleading or practice?	Sec. 137-12. Same continued. Amendment when variance material.
137-9. Variance defined—Scope and meaning.	137-13. Immaterial variance.
137-10. The code variance.	137-14. Form of affidavit to show material variance.
137-11. When variance deemed material.	137-15. Failure of proof.

Sec. 137-8. Variance—Does it come under pleading or practice?—It would seem that we should look at the subject of variance from two standpoints. It concerns both pleading and trial practice. In drawing our pleadings we must have our proofs well in hand, framing allegations so as to permit the introduction of the evidence. The rules of variance demonstrate the necessity of having a complete knowledge of the facts, and how and by whom the same are to be proven. Pleadings are designed to narrow a controversy down to an issue, and parties are presumed to have deliberately formed that issue. We must know in advance what we can prove under our allegations; a plaintiff must have a well-defined theory for his case, and proceed both in pleading and evidence in accordance therewith. The general principles governing this matter should be mastered in connection with the subject of pleading, and their practical application or results as we find them in the cases may come more appropriately in a book on practice.

Sec. 137-9. Variance defined—Scope and meaning.—The whole purpose of pleading, both of plaintiff's cause of action and defendant's defense, is to apprise each other of the real cause of action so that they may prepare for the introduction of proof to substantiate the same. It is quite essential, therefore, that well-defined rules be prescribed for the admission of the proper kinds of evidence under the allegations of particular causes of action. If it were not for the existence of the rule that the *probata* should correspond with the *allegata*, it would be unnecessary to have rules and forms of pleadings.

Thus arises the doctrine of variance which may be defined as a disagreement between the allegations in a pleading and the proof offered to support them.

That a full and complete understanding may be had of the subject under the reformed procedure, it may not be amiss to glance at the rule as it existed at common law. There a variance was followed with much more disastrous results than it is under the code procedure. If the pleader did not have a proper conception of his facts or cause of action, and hence did not follow closely the technical rules of pleading; or, if he was disappointed in his proofs at trial, failure would be his fate, even though his action or defense may have been a meritorious one. It is by the test of the evidence to be offered at the trial that a pleader must decide upon the facts he should allege. A variance was fatal to the party holding the affirmative, the jury being bound to find the issue against him. But very early in English jurisprudence, recognizing the great expense, delay and failure of justice which followed the rigid enforcement of this rule, the common law was modified by the statute allowing amendments to be made in pleadings when the variance was immaterial. The established common-law rule was, that when the disagreement between the proof and allegation was upon a material point, it was fatal to the party on whom proof rested as a total failure of evidence. But the rule was not so rigorously observed as to compel the party on whom the proof rested to make good his allegation to the letter but only the substance, and a variance in form or in a matter immaterial was disregarded.¹ The subject will be better understood by a comparative view of the common law and code variance. "It is a general rule, that a contract must be stated correctly, and if the evidence differ from the statement, the whole foundation of the action fails, because the contract is entire in its nature, and must be proved as laid."² And so would a misdescription of the parties to a contract, and with whom it was made, cause a fatal variance.³ The misstatement of the date of a written instrument,⁴ or as to the time of performing a contract,⁵ would likewise cause a variance. Under the power of amendment such matters may be cured by amendment under the code.

Andrews Stephen's Pldg., sec. 90. The common-law rule in regard to variance has been so modified, and courts are so liberal in allowing amendments, that it is not so important at the present day as it was

formerly. Shipman's Com. Law Pldg., p. 340.

¹ 1 Chitty's Pldg., 312.

² 1 Chitty's Pldg., 314.

³ 1 Chitty, 318.

⁵ Id. 319.

Sec. 137-10. The code variance.—The codes, following to some extent the common-law variance, have prescribed three kinds: 1st. An immaterial variance; 2nd. When the proof varies from the allegation; 3rd. Where the evidence wholly fails to agree with the allegation.

Under the Ohio code, when the allegation in its general scope and meaning is not proved, it is not deemed a case of variance but a failure of proof.¹

Thus, we have in the Ohio code really but two kinds of variance, the one material, the other an immaterial variance, and what was termed a fatal variance at common law is now styled a failure of proof. The same results, therefore, do not follow a variance under our practice as did at common law. An immaterial variance is of little consequence; a material variance may be easily remedied without serious consequences, in the form prescribed by the code. As shown in the preceding section, a disagreement upon a material point was fatal. The code defines a material variance as one which has actually misled a party to his prejudice, but does not treat it with such severity as did the common law. If the party who has suffered by a variance upon a material matter makes proof of that fact, the court may order the pleadings to be amended upon such terms as may be just.² And so may an amendment be ordered in case of an immaterial variance.³ Under the liberal powers of amendment granted by the code the harshness of the rule is taken away. The court has the discretion to grant leave to amend in case of an immaterial or material variance. Where there is a failure of proof, an amendment will not ordinarily be allowed unless clearly in furtherance of justice.⁴

Sec. 137-11. When variance deemed material.—No variance between the allegation in pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon its merits.⁵ The variance, to be material, must be upon some substantial matter or elements of the case,⁶ and must not arise upon legal conclusions from the facts drawn by the pleader.⁷

The provision has reference to mere discrepancies between the issues raised by the pleadings and the evidence offered in support thereof, and not to cases where the same are not proven at all.⁸

¹ Whittaker's Code, sec. 5296.

² Whittaker's Code, sec. 5294.

³ Whittaker's Code, sec. 5295.

⁴ Maxwell's Code Pldg. 572.

⁵ Whittaker's Code, sec. 5294.

⁶ Dodd v. Denny, 6 Oregon, 156;

Piatt v. Longworth, 27 O. S. 159.

⁷ Piatt v. Longworth, *supra*.

⁸ Thompson on Trials, sec. 2252; Waldhier v. R. R. Co., 71 Mo. 514, 516; Fuher v. Villwock, 14 O. C. C. 389.

Sec. 137-12. Same continued—Amendment when variance material.—It has been said that the test of variance which at common law would defeat a recovery was whether the case proved was a new one. Necessarily at common law the boundaries between the various common-law actions had to be carefully observed, as the procedure consisted largely of forms, and the consequences of a mistake in the application of the remedy were very material. An amendment could not be made so as to change the form of action, and hence a non-suit would follow. But the test by which a variance will be deemed material under the code provision is determined by the fact that the adverse party has been misled. And unless this fact is made to appear in the proper manner, the variance may be disregarded by the court and considered and treated as an immaterial one.

The code provides that when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled. In such case the court may, in its discretion, order the pleading to be amended upon such terms as are just.¹ The variance may sometimes appear on the face of the pleadings,² though it is more frequently determined by proof *aliundi*.³ Where leave to amend is asked on the ground of variance between pleading and proof, it may very properly be refused unless the statutory affidavit is filed, showing wherein the applicant has been misled to his prejudice.⁴ The fact that the party has been misled must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled.⁵ Whether the court will require any further showing to be made than the affidavit of the party is probably discretionary. Whether the variance be material or not, it is not error to refuse leave to amend if the facts proved do not show a good cause of action.⁶ And so the power of the court to grant leave to amend even in case of a material variance being discretionary, there can be no complaint upon error unless there has been an abuse of discretion.⁷ And the fact that a pleading is not amended to conform to the proof

¹ Whittaker's Code, sec. 5294; Barnett v. Ward, 36 O. S. 111-12.

² Place v. Minster, 65 N. Y. 89, 104.

³ Catlin v. Gunter, 11 N. Y. 368; 62 Am. Dec. 113.

⁴ Bank v. Wills, 79 Mo. 275, citing Shelton v. Durham, 76 Mo. 434;

Meyer v. Chambers, 68 Mo. 626 and other cases.

⁵ Barnett v. Ward, 36 O. S. 107.

⁶ Ferguson v. Miami Powder Co., 9 O. C. C. 445.

⁷ Fuher v. Villwock, 14 O. C. C. 389.

does not constitute grounds for reversing a judgment upon error.¹ If the facts proved are entirely different from those alleged, so much so as not to entitle the party to go to the jury, and the party does not amend so as to conform to the evidence, it is considered under the code a failure of proof and not variance.²

Sec. 137-13. Immaterial variance.—An immaterial variance is one where the discrepancy is so slight and so unimportant that it does not mislead or prejudice the adverse party.

When the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without cost.³ When the variance is not material an amendment is unnecessary, and a court can not, in such case, be justified in arresting the cause from the jury and in directing a non-suit.⁴ Whether a variance is material or not, it is not error to refuse leave to amend if the facts do not constitute a cause of action.⁵ In criminal law, however, the rules as to admission of evidence clearly at variance with the allegations are more strictly observed, and it is considered reversible error to admit such evidence.⁶ When there is no objection made to a variance, it is to be regarded, under the code, as immaterial.⁷

Sec. 137-14. Form of affidavit to show material variance.

In the Court of Common Pleas of — County, Ohio.

A. B.,

Plaintiff,

v.

C. D.,

Defendant.

} Affidavit to show variance.

The State of Ohio, — County, ss.

C. D. being first duly sworn, says that he is the defendant in the above entitled action, and that at the trial of said cause, before Honorable ———, Judge of the Court of Common Pleas, and a jury duly empanelled, the said plaintiff introduced the following evidence in support of his cause of action. (Here state so much of the evidence as may be necessary.)

Defendant states that there is a material disagreement between said evidence and the allegations of the plaintiff in his petition, in this, to wit:

(Here state the allegations of the petition sufficiently to show the variance.)

¹ *Sibila v. Bahney*, 34 O. S. 399.

⁵ *Ferguson v. Miami Powder Co.*,

² *Waldhier v. Railroad Co.*, 71 Mo.

supra; *Sibila v. Bahney*, 34 O. S. 399.

514.

⁶ *Hart v. State*, 20 Ohio, 49.

³ *Whittaker's Code*, sec. 5295.

⁷ *Insurance Co. v. Bonnell*, 89 O. S. 387.

⁴ *Ferguson v. Miami Powder Co.*,

9 O. C. C. 445; *Barnett v. Ward*, 36 O. S. 107.

Defendant further states that by reason of such disagreement between the allegations and proof, he has been misled in the following manner:

(Here state particularly how the party has been misled.)

Sec. 137-15. Failure of proof.—When the allegation of the claim or defense, to which the proof directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance, but a failure of proof.¹ A failure of proof and a variance are clearly distinguishable. When there is no case whatever proved, there is a failure of proof;² but where all of a charge or claim is not proven but a portion is, that not proven may be treated as surplussage, and a non-suit refused.³ As for example, where the complaint contains an allegation of a cause of action in contract not sounding in tort, although it may charge tortious acts on the part of the defendant, the plaintiff will be allowed to recover, upon the allegation of his complaint resting on contract, and the allegations of wrong may be treated as surplussage.⁴ But where it is alleged that a defendant by means of fraud obtained goods from the plaintiff and converted them to his own use, and the proof in support thereof shows that the defendant is a *bona fide* purchaser from one in possession, but without title, there can be no recovery, because of failure of proof.⁵ And so in an action for the recovery of real estate, to which is interposed a general denial, and the proof shows an equitable title in the defendant, there is a failure of proof. Such a defense must be specially pleaded.⁶ If the right of a plaintiff to sue depends upon his title to the property sued for, and this is not taken advantage of by demurrer or answer, as it may be, and the plaintiff fails to show such title, there is a failure of proof.⁷ An amendment will not be allowed in case of a failure of proof, unless it may be done under the provision allowing amendments in furtherance of justice.⁸ A question of failure of proof may be raised by a motion for a non-suit, or for the direction of a verdict, or demurrer to the evidence, and must be raised in the trial court to be made available upon error.⁹

¹ Whittaker's Civ. Code, sec. 5296.

² Dunn v. Durant, 9 Daly, 389.

³ Dodge v. Eckert, 24 N. Y. S. 1074.

⁴ Dodge v. Eckert, *supra*.

⁵ Dean v. Yates, 22 O. S. 388.

⁶ Powers v. Armstrong, 36 O. S. 357.

⁷ Reed v. Jordan, 12 O. C. C. 161.

⁸ Egert v. Wicker, 10 How. Pr. 193.

⁹ Cummings v. Petsch, 41 Minn. 115.

SPECIAL SUBJECTS.

CHAPTER 11.

ACCORD AND SATISFACTION.

Sec. 138. Defined.

139. Consideration therefor.

140. What constitutes an accord and satisfaction.

141. Who may make.

142. Rules of pleading in accord and satisfaction.

143. Setting aside.

Sec. 144. General answer of accord and satisfaction.

145. Answer claiming settlement by note.

146. Answer pleading compromise.

147. Answer pleading compromise with creditors.

Sec. 138. Defined.—An accord and satisfaction is defined to be an agreement between parties to receive some act or thing in satisfaction of a claim or injury; to be of any effect as a defense or bar, it must be upon a consideration; it is also essential that there be an actual acceptance before satisfaction will be deemed to have been made; as an accord without a satisfaction is not a bar to an action; there must also be a performance under the accord.¹

Sec. 139. Consideration therefor.—An accord and satisfaction being a new agreement between parties into which an original one is merged, must necessarily be upon a new consideration, as any other contract. While it may be true that what will or will not constitute a consideration may depend upon the particular circumstances of each case,² there have been many adjudications upon this question which will serve as a guide in like cases. A mere moral obligation, however, cannot be deemed a sufficient consideration; an obligation of honor cannot be enforced; as, for example, where a man has compromised with his creditors by paying a certain per cent. of his indebtedness, a subsequent promise by the debtor to pay one of the creditors the full amount of his indebtedness is without consideration, and cannot be enforced.³

¹Ellis v. Bitzer, 2 O. 89-94; Frost v. Johnson, 8 O. 394; Ogilvie v. Hallman, 58 Ia. 714; Russell v. Lytle, 6 Wend. 390.

²Hall v. Smith, 15 Ia. 584; Babcock v. Hawkins, 23 Vt. 561.

³Lewis v. Simons, 1 Handy, 93; Way v. Langley, 15 O. S. 392. See also

Among the things which have been held to constitute a consideration is an agreement to pay at an earlier date or different place;¹ or the taking of other and different security;² but in order that the acceptance of new security shall operate as payment it must appear that such was the intention of the parties.³ Or a release of a claim which might be brought against a party; even though the claim be invalid, it will nevertheless operate as a sufficient consideration to support an accord.⁴ Mutual promises to do something in the future simply amount to an accord without satisfaction, and do not, therefore, furnish any consideration;⁵ nor does an agreement by parties to a suit that it shall be decided for one or the other according to the result of another suit pending between them constitute a consideration, as it is a mere wager, and void.⁶ But a compromise made by a debtor with his creditor by which it was agreed that the debtor should pay a claim which the creditor was owing a third party, which is less, however, than the amount due from his debtor, is nevertheless a good consideration; especially where it is made under an agreement that a trial should not be had of a suit which the creditor had instituted for the enforcement of his claim while negotiations are pending for settlement, the compromise being the result of that agreement.⁷ The new consideration having been accepted and acted upon, a suit cannot then be brought upon the original liability, but must be upon the compromise.⁸ The subject of consideration runs largely into the next section.

Sec. 140. What constitutes an accord and satisfaction.— The rule at common law and the general American rule supported by numerous authorities is that part payment of a

to moral consideration, *Jennings v. Brown*, 9 M. & W. 496; *Eastwood v. Kenyon*, 11 A. & E. 438.

¹ *Barry v. Goodrich*, 98 Mass. 385; *Bowker v. Childs*, 8 Allen. 434.

² *Boyd v. Hitchcock*, 20 Johns. 76; *Pullian v. Taylor*, 50 Miss. 251; *McIntyre v. Kennedy*, 29 Pa. St. 448; *Bowker v. Harris*, 80 Vt. 424; *Keller v. Salisbury*, 33 N. Y. 648.

³ *Kemmer's Appeal*, 102 Pa. St. 558.

⁴ *Wilder v. Railroad Co.*, 25 Atl. Rep. 896 (Vt., 1892).

⁵ *Frost v. Johnson*, 3 O. 398; *Dunn v. Life Insurance Co.*, 8 Am. Law Rec. 569; *Bird v. Smith*, 34 Ma. 63; 56 Am. Dec. 635.

⁶ *Gittings v. Baker*, 3 O. S. 21.

⁷ *Mitchell v. Knight*, 7 O. C. C. 204.

⁸ *Parkison v. Boddiker*, 10 Colo. 508; 15 Pac. Rep. 806 (1887).

debt, although accepted by a creditor in satisfaction thereof, does not constitute an accord and satisfaction, nor operate as a bar to an action for the recovery of a balance, even though the parties have expressly agreed that it shall be a release of the entire amount; there is no consideration, but is merely a *nudum pactum*.¹ The strict common-law rule, however, was so technical and so often fostered bad faith that it has been very materially departed from, and a very slight consideration allowed to support an agreement to accept a less sum, or an actual acceptance of a less sum, made binding upon various considerations; as, for example, payment at a different place than that named in the contract or before the debt is due;² or a payment of a debt in bills of exchange, goods on hand and goods to be manufactured, although it amounts to less than the debt;³ but the surrender of a doubtful right and a settlement made upon it, in the absence of fraud, will not be disturbed, especially where the parties cannot be restored to their original situation.⁴ Want of consideration cannot be urged in such case as a defense, as the compromise of a doubtful right or claim is regarded as a sufficient foundation for an agreement.⁵ It has been held in Pennsylvania that a partial payment of an undisputed claim under an agreement to receive it in full satisfaction cannot be treated as an accord and

¹ Bailey v. Day, 26 Me. 88; White v. Jordan, 27 Me. 370; Rose v. Hall, 26 Conn. 392; S. C., 68 Am. Dec. 402; Kerr v. O'Connor, 63 Pa. St. 341; Twitchell v. Shaw, 57 Am. Dec. 80; Grinnell v. Spike, 128 Mass. 25; Warren v. Skinner, 20 Conn. 559; Ryan v. Ward, 48 N. Y. 204; Fire Insurance Co. v. Wickham, 141 U. S. 464; Miller v. Eldridge, 126 Ind. 461; S. C., 27 N. E. Rep. 182. See Curran v. Rummell, 118 Mass. 482; Clifton v. Litchfield, 106 Mass. 34. If the debt is uncontroverted, payment of an amount less than the amount due is no defense. Fletcher v. Wurgler, 97 Ind. 238; Markel v. Spittler, 28 Ind. 488. The assignee is bound by the agreement of the assignor. Pontious v. Durlinger, 59 Ind. 27; Shade v. Creviston, 93 Ind. 591.

² Ante, sec. 139; Harper v. Graham, 20 O. 105; Smith v. Wyatt, 2 Q. S. S. R. 18; Mitchell v. Knight, 7 Q. C. C. R. 207; Jones v. Perkins, 64 Am. Dec. 186; Fenwick v. Phillips, 8 Met. 87; McKenzie v. Culbreth, 66 N. C. 534; Harriman v. Harriman, 12 Gray, 341.

³ Rose v. Hall, 68 Am. Dec. 402; 26 Conn. 392.

⁴ More v. Powell, 1 Dian. 144.

⁵ Swem v. Green, 9 Colo. 358; Moore v. Powell, supra; Commissioners v. Hunt, 5 O. S. 488; S. C., 67 Am. Dec. 308; Weed v. Terry, 45 Am. Dec. 257; Mills v. Lee, 17 Am. Dec. 118.

satisfaction so as to prevent a recovery of the balance.¹ And a promise made upon a compromise of a doubtful claim which is groundless is not binding.² Even though there may have been fraud in a settlement or compromise, the contract must be rescinded and the amount received thereunder tendered back if the party desires to repudiate it.³ Dismissal of a suit for a nuisance prosecuted in good faith is a good consideration for a contract to discontinue the business, such as a chemical laboratory which was the cause of the nuisance;⁴ or the receipt of a portion of money lost at gambling may operate as a satisfaction for a larger sum so lost.⁵ If a mortgage be released by a compromise between parties, the transaction or compromise is an entirety and the consideration for the release cannot be avoided without also avoiding the release;⁶ and where a third person who has by agreement with a mortgagor assumed payment of a note and mortgage desires to obtain more time, which the holder refuses, gives the holder his check, and procures another person to buy the note and mortgage, such other person not knowing that he is buying from a party who is obliged to pay, but believing he is buying title from some one else, may recover from the maker.⁷

There must always be a mutuality of understanding between the parties to an accord and satisfaction. So, where an insurance company places insurance upon property and afterwards there is a re-issue by another company, and, loss occurring, the insured settled with the first company for a certain sum in full satisfaction of his claim, and the second company settled upon the same basis, without any agreement with the insured, such an accord cannot be binding because the parties did not arrive at a mutual understanding.⁸ Where a person who has secured a judgment against several parties makes an arrangement with the sheriff by which a compromise is made through that officer, and one of the parties is

¹ Commonwealth v. Cummins, 155 Pa. St. 30; 25 Atl. Rep. 996 (1893).

² Smith v. Wyatt, 2 C. S. C. R. 12.

³ Schnell v. Nell, 17 Ind. 29; S. C., 79 Am. Dec. 453.

⁴ Heighway v. Pendleton, 15 O. 736 (1846).

⁵ East Tennessee, etc. Ry. v. Hayes, 83 Ga. 558 (1889); Home Ins. Co. v. McRichards, 121 Ind. 121 (1889).

⁷ McFarland v. Norton, 8 W. L. R. 368.

⁸ Grasselli v. Lowden, 2 Disn. 323.

⁶ Detroit, etc. Ins. Co. v. Commercial Mutual Ins. Co., 1 Cleve. Rep. 81.

allowed to pay a certain sum in full satisfaction of the judgment against him, such a payment amounts to an accord and satisfaction of the whole judgment.¹ Where a composition has been made by a debtor with his creditors to pay them a certain per cent. in satisfaction of his indebtedness, and one of the creditors undertakes to obtain for himself a greater sum than the others, and the debtor subsequently voluntarily executes to one of his creditors a note for the remaining per cent. of his indebtedness to him, which is made payable before the payments to be made under the composition agreement are due, such a note is without consideration and void as to the parties to the original agreement as being in fraud of their rights.² Such a composition is not only an agreement between the creditors themselves, but is one also between them and the debtor, and the utmost good faith must be observed. If one creditor takes advantage of the others by endeavoring to secure a greater amount, any obligation for such excess is held to be in fraud of others and void.³ The payment by one jointly liable with others for damages for personal injuries of a sum upon an agreement by the injured party not to sue, though not in settlement of damages, is not an accord and satisfaction;⁴ but a settlement made with one of several joint trespassers or wrong-doers operates as a satisfaction to all, and partial satisfaction inures to all of them.⁵ But it is otherwise where the wrong done is divisible; it may then become a question of fact for the jury.⁶

Sec. 141. Who may make.—The object aimed at in this section is a review of adjudications upon the subject of accord and satisfaction made by the various relations of parties. An administrator may make settlement of the partnership affairs of a deceased partner whom he represents with the surviving partners, and relinquish all claim to real estate held by the partnership for partnership purposes, the same being regarded

¹ Runyan v. Van Dyke, 7 Am. L. Rec. 8.

² Way v. Langley, 15 O. S. 392.

³ Ray v. Brown, 8 W. L. B. 545; Way v. Langley, 15 O. S. 392.

⁴ Chicago v. Babcock, 148 Ill. 353; 32 N. E. Rep. 271 (1892).

⁵ Maxwell's Pleading, p. 414, and authorities; Ellis v. Bitzer, 2 O. 89.

See *post*, sec. 141. See, also, 1 Am. & Eng. Ency. of Law, p. 106.

⁶ Ellis v. Esson, 50 Wis. 486.

as personal property. His action in this respect will be binding on the heirs of the deceased partner.¹ An administrator may also compromise and rescind an executory contract entered into by his decedent for conveyance of realty, where it may be to the best interest of the estate which he represents; and courts will not look with favor upon any objection made by the heirs at law,² and will not aid them to set aside an arrangement of this character which is beneficial to the estate.³ After a judgment has been rendered by a court, an attorney has no control over it, and cannot, therefore, enter into any negotiations which would tend to render it of no avail without the consent of the parties to the suit, to whom it belongs entirely. This is the case even though the parties may be entirely ignorant of the fact that the judgment has been rendered.⁴ Nor can an attorney who is intrusted with the collection of a note make any arrangement with the maker thereof to board his law partner in settlement of the same. His client would have the right to repudiate any such adjustment and to sue for a recovery of the amount due on the note.⁵ An agent who has written authority to see a debtor "in regard to" a debt, with "full authority to act for" the creditor "in the matter," may be authorized to receive from the debtor any personal property in satisfaction of the debt.⁶ And directors of an insurance company who have full power to compromise any suit which may be improvidently brought may do so by the cancellation of policies and the surrender of premium notes. Their action in this respect may constitute a defense against any assessment which may be made upon the same notes on account of any loss sustained prior to the settlement.⁷ The directors are charged with the management of all the affairs of the company, and power to make such adjustments is deemed so essential that its existence is implied.⁸ It has been held in Ohio that one of several joint

¹ Ludlow v. Cooper, 4 O. S. 1. See, also, Story on Partnership, sec. 98; Green v. Green, 1 O. 535; Green v. Graham, 5 O. 264.

² Ludlow v. Cooper, *supra*.

³ Howard v. Babcock, 7 O. 405.

⁴ Boyle v. Beattie, 2 C. S. C. R. 490.

⁵ In re Temple, 38 Minn. 348; 23 N. W. Rep. 468 (1885), holding that the conduct of the attorney was unprofessional.

⁶ Oliver v. Sterling, 20 O. S. 391.

⁷ Wadsworth v. Davis, 18 O. S. 122.

⁸ Id.

creditors, who do not sustain the relation of partners, cannot release a debt due them jointly, so as to make it binding on those not participating therein, but that recovery may be had in equity. So as to a debtor who himself procures the release from some of them. This action on his part will not preclude the others from proceeding against him in equity for their proportion.¹ A release, however, made by one of the creditors will preclude the co-creditors who do not assent thereto from prosecuting an action at law. The distinction is, that in an action at law by the creditors all must join and all must recover, or none of them; while equity does not require all of the creditors to join, when by such a course justice would be defeated.² It is said that, to have the effect of releasing all, the release should be under seal.³ The principle underlying this rule is that joint creditors cannot, by a division among themselves, acquire separate rights of action against the debtor; that the demand is single and cannot be split.⁴ So it is held that, where it is necessary that several plaintiffs must join in an action, a release made by one joint plaintiff will operate as a bar to an action by the remaining ones; as, where all tenants in common must join in an action for trespass, a release made by one of them will defeat any further action;⁵ or a release by one or more parties to a joint agreement is a bar to an action by the remainder.⁶ The rule is different, however, as to the release of joint debtors, a release made to one not operating to the benefit of his co-debtors,⁷ as will be seen further along in this section. Ohio, however, is an exception in this respect.⁸

Where a compromise has been made of a claim which may be regarded as of a doubtful character in equity, it may nevertheless raise a sufficient consideration for a compromise so that a court of equity will not interfere with its fulfillment, especially when it is supported by a moral obligation. So the commissioners of a county may settle and compromise a

¹ *Upjohn v. Ewing*, 2 O. S. 14. See, also, *Reigart v. Ellmaker*, 14 S. & R. 121; *Eisenhart v. Slaymaker*, 14 S. & R. 153.

² *Upjohn v. Ewing*, 2 O. S. 14 (1853).

³ 1 Am. & Eng. Ency. of Law, pp. 103-4.

⁴ See *ante*, sec. 19.

⁵ *Austin v. Hall*, 13 Johns. 286; *Decker v. Livingston*, 15 Johns. 479.

⁶ *Myrick v. Dame*, 9 Cush. 248; *Tuckerman v. Newhall*, 17 Mass. 581.

See *Hasack v. Rogers*, 8 Paige, 229.

⁷ R. S., sec. 3166.

⁸ 1 Am. & Eng. Ency. of Law, pp. 103-4, and cases cited.

claim or liability which may be justly due the county, and, if supported by a moral obligation upon the part of the county, it will serve as a sufficient consideration to warrant a court of equity in refusing to interfere with the settlement.¹ A compromise made and accepted, and benefits derived therefrom, will, in the absence of any fraud or unfairness, be binding upon all parties thereto and enforceable in equity. It is well-settled law that a release of one of several joint trespassers or tort-feasors operates as a discharge of all.² The principle upon which this rule is based is that the act of one of several joint trespassers is the act of all, and that, all uniting in doing an unlawful act, each one is responsible for the acts of the others, and that the plaintiff may either sue them jointly or separately. So where an injured party accepts a satisfaction from one merely as a settlement as to him, but not intending it to operate as a compromise as to the others, the cause of action is nevertheless discharged as to all of them;³ but the release in such cases must be a technical one and not merely by implication or a covenant not to sue.⁴ A partial satisfaction by one will operate as a satisfaction *pro tanto* as to all.⁵ Even though the damages be uncertain, a release of one for a sum certain will release all.⁶ It is provided by statute that, whenever there is a dissolution of a partnership, one of the partners may make a separate composition with a partnership creditor which shall operate as a full and effectual discharge to the debtor making the same, and to him only, from all liability to the creditor with whom the same is made;⁷ and that such debtor may take from the creditor a note or memorandum in writing, exonerating him from any individual liability incurred by reason of his connection with the partnership, which will operate as a bar to any action by the creditor against him.⁸ This compromise, however, shall

¹ Shanklin v. Commissioners, 21 O. S. 575-88; Commissioners v. Hunt, 5 O. S. 488.

² See *ante*, sec. 140.

³ Ellis v. Bitzer, 2 O. 89 (1825); Stone v. Fickinson, 5 Allen, 29; Brown v. Cambridge, 8 Allen, 474; Goss v. Ellison, 186 Mass. 508.

⁴ Bailey v. Berry, 6 Am. Law R. (N. S.) 270.

⁵ Merchants' Bank v. Curtiss, 87 Barb. 317.

⁶ Long v. Long, 57 Ia. 497; Urton v. Price, 57 Cal. 270; Mitchell v. Allen, 25 Hun, 543.

⁷ R. S. sec. 3162.

⁸ R. S., sec. 3163.

not discharge any other partners, or impair the right of the creditor to proceed against any of the members of the partnership who have not been discharged; nor shall the discharge of an individual member of the firm prevent other members from availing themselves of any defense which they might have had were it not for this provision, except that they shall not set up the discharge of one individual as a discharge of the other partners, unless it appear that they all were intended to be discharged. A discharge of one partner shall be deemed a payment to the creditor equal to the proportionate interest of the one so discharged in the partnership concern.¹ These provisions are made applicable by statute² to all other joint debtors who may individually compromise their joint indebtedness. So that a compromise made by one joint debtor will only operate as a discharge of his liability to the creditor and will not therefore release the other joint obligors. Accord and satisfaction may be made by an entire stranger, who has no pecuniary interest whatever in the subject-matter, and if accepted by the creditor will constitute a good defense to an action by him to enforce the liability against the debtor.³

Sec. 142. Rules of pleading in accord and satisfaction.—

It has been shown that an accord and satisfaction to be good must be a new agreement founded upon some new consideration. It is not sufficient that there be simply an accord and satisfaction, but in pleading the settlement it must be averred that the accord was accepted and executed. Mere readiness to perform or a tender of performance, or even a partial performance and readiness to perform the rest, is not sufficient.⁴ The petition must also state that there is nothing due the plaintiff from the defendant, and that there has been a full and complete payment and settlement.⁵ In pleading an accord and satisfaction with several creditors it should be alleged that an agreement to accept the composition was in

¹ R. S., sec. 8164.

Am. Dec. 473; *Kerr v. O'Conner*, 63

² R. S., sec. 8166.

Pa. St. 347; *Frich v. Algeir*, 87 Ind.

³ *Leavitt v. Morrow*, 6 O. S. 72. 256; *Bagley v. Haman*, 32 Eng. C. L. 379; *Clifton v. Litchfield*, 106 Mass. 28. But see 1 Am. & Eng. Ency. of Law, p. 97.

⁵ *Hall v. Smith*, 15 Ia. 584; *Merry*

⁴ *Hearn v. Kiehl*, 38 Pa. St. 147; 80 v. Allen, 39 Ia. 235.

consideration of all of the creditors joining therein.¹ It is not necessary, however, in an action for the recovery of goods wrongfully detained, to state in an answer that there was a special agreement made by the parties; that although the plaintiff had a right to the possession of the property he had waived the same. It is competent to prove this fact under an answer which simply denies the plaintiff's right of possession.² A reply to a pleading of accord and satisfaction that it is tainted with fraud and brought about by undue influence cannot be made available by failure to tender the sum received upon the compromise, where the pleading does not aver the payment of any money to the plaintiff.³

Sec. 143. Setting aside.—Whenever fraud enters into accord and satisfaction in any way it will necessarily vitiate the same. Therefore, if a debtor who has made a settlement with his creditors upon the theory that he was insolvent, had made a conveyance in fraud of his creditors prior to the compromise, it will be set aside;⁴ or a settlement made by a person who has received a personal injury, while he was under the influence of opiates, will be void.⁵ And so with a settlement made during a sickness caused by injuries, upon inducements made by the agents of the party inflicting the injury;⁶ or the receipt of a promissory note of a third person in settlement of a claim may be vitiated, if there was a false representation as to the financial standing of the maker of the note;⁷ or, if the parties to the accord and satisfaction have been mutually mistaken as to some material matter, the same may be void;⁸ or, if the party signing the accord be under some restraint or duress, it may be set aside.⁹ But it is said that when a settlement has been amicably made between two persons, one of them cannot afterwards claim that it was made under duress. If such objections could be raised, every adjustment might be destroyed, and accord and satisfaction

¹ *Fellows v. Stevens*, 24 Wend. 298, 399.

² *Timberlake v. McArthur*, 8 Am. Law Rec. 713.

³ *Knoxville, etc. R. R. Co. v. Acuff*, 20 S. W. Rep. 848 (Tenn., 1892).

⁴ *Richards v. Hunt*, 27 Am. Dec. 545.

⁵ *Chicago, etc. Railroad Co. v. Doyle*, 18 Kan. 58.

⁶ *Eagle Packet Co. v. Defries*, 94 Ill. 598.

⁷ *Bridge v. Batchelder*, 9 Allen, 394; *Pierce v. Drake*, 15 John. 475.

⁸ *Wheadon v. Olds*, 20 Wend. 174; *Calkins v. Griswold*, 11 Hun, 208, 210.

⁹ *Rourke v. Story*, 4 E. D. Smith, 54.

be unknown in law.¹ It might be added that a distinction can be clearly drawn between an adjustment amicably made and one made under duress or restraint.

Sec. 144. General answer of accord and satisfaction.—

[*Caption.*]

On the — day of —, 18— [*or*, after the cause of action stated in the petition accrued, and before this action was brought], defendant paid to the plaintiff the sum of — dollars, which sum the said plaintiff received in full satisfaction and discharge of the claim set forth in his said petition.

Wherefore he demands judgment for costs.

Another form:—

That he, the said defendant, before the commencement of this action, to wit, on the — day of —, 18—, paid to the said plaintiff the sum of — dollars in full satisfaction and discharge of the sum in the said breach of covenant mentioned, and of all the damages mentioned, by reason of the non-payment thereof; which said sum of — dollars the said plaintiff then and there accepted and received of and from this defendant in full satisfaction and discharge of the said sum in the said breach of covenant mentioned, and of the damages of the said plaintiff by him sustained by reason of the said breach of covenant.

Sec. 145. Answer claiming settlement by note.—

[*Caption, etc.*]

That prior to the — day of —, 18—, defendant made several payments in different amounts on the account sued on, and a dispute having arisen between the plaintiff and defendant as to the amount of said payments and the sum actually due on said account, and in consideration of which, and to avoid expense and litigation, it was mutually agreed that defendant should execute and the plaintiff receive, in full satisfaction of said account, the defendant's note, due on the — day of —, 18—, for the sum of — dollars, in full satisfaction of said account and in settlement of said dispute, which note defendant then and there executed to the plaintiff, and said plaintiff accepted the same in full satisfaction of said account.

NOTE.— Many authorities hold that a note given and actually received and accepted in settlement of a debt will bar an action on the original, even though the note is not paid. *Wyman v. Fabeus*, 111 Mass. 81; *Bangor v. Warren*, 84 Me. 324; *Stephens v. Thompson*, 28 Vt. 77; *Fowler v. Bush*, 21 Pick. 280; *Hudson v. Bradley*, 2 Cliff. 130. Circumstances may, however, vary cases, and evidence may be received to show that it was not intended as a settlement or payment of a contract debt. *Lovell v. Williams*, 125 Mass. 439; *Parnham Machine Co. v. Brock*, 113 Mass. 194; *Perrin v. Keene*, 19 Me. 355; *Graham's Estate*, 14 Phila. 280. As to checks, see *Weddigen v. Boston Elastic Fabr. Co.*, 100 Mass. 422.

¹ *Matthews v. Briggs*, 1 W. L. B. 81.

Sec. 146. Answer pleading compromise.—

That before this action was brought, to wit, on the — day of —, 18—, the plaintiff presented to this defendant a claim for the sum of \$—, which he claimed to be due [*for services rendered him as — whatever they may be*]. which said defendant refused to pay because [*state facts as to grounds of refusal, as, for example, that the claim was doubtful, or, that the defendant denied that plaintiff had rendered services to the extent claimed*].

That thereupon it was mutually agreed between the said plaintiff and defendant that they should compromise said claim, and it was thereupon agreed that the defendant was to pay and the plaintiff to accept the sum of \$— in full satisfaction thereof, which said sum the defendant so paid, and the plaintiff in pursuance of said agreement accepted the same.

Sec. 147. Answer setting up compromise with creditors.

Defendant admits that on the — day of —, 18—, he was indebted to the plaintiff as set forth in the petition, but alleges that on or about the — day of —, 18—, being in embarrassed circumstances, a composition agreement was entered into between himself and his creditors, including the plaintiff, whereby he was to pay a certain sum, to wit, \$—, to be distributed *pro rata* among said creditors, upon the payment of which sum the said plaintiff and the other creditors were to release the defendant of the remaining — per cent. of the original indebtedness; that the defendant thereupon complied with all the terms of said agreement, and paid the sum agreed upon to the plaintiff and other creditors in full satisfaction of the plaintiff's debt and the several debts of such creditors respectively, each covenanting and agreeing with the defendant to accept the sum in full satisfaction of all claims and demands against him.

CHAPTER 12.

ACCOUNT.

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| <p>Sec. 148. Account defined — What may be subject of account.</p> <p>149. Payments on account, how treated.</p> <p>150. Effect of charges as reflecting on whom credit is given.</p> <p>151. Pleading in account.</p> <p>152. Ordinary form of petition, and notes on evidence.</p> <p>153. Petition for goods sold and money advanced.</p> <p>154. Petition for labor performed and materials furnished.</p> <p>155. Petition on account against partnership — Averment as to acknowledgment of correctness.</p> <p>156. Petition for account for attorney's fees.</p> <p>157. For services rendered as auctioneer and money expended.</p> | <p>Sec. 158. Action by assignee of account and form of pleading.</p> <p>159. Limitation of actions on.</p> <p>160. Account stated — Defined.</p> <p>161. Account stated may be opened.</p> <p>162. Pleading account stated.</p> <p>163. Petition on account stated.</p> <p>164. Petition to correct account stated.</p> <p>165. Answer and cross-petition claiming set-off for services rendered.</p> <p>166. Answer setting up statute of limitations.</p> <p>167. Answer of settlement by note.</p> <p>168. Answer setting up fraud or mistake in account stated.</p> <p>169. Judgment on account.</p> |
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Sec. 148. Account defined — What may be subject of account.— An account is defined as a detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contract or from a fiduciary relation.¹ A book account is an entire thing, as much as articles of agreement or a bond. It is made up of different items charged from time to time as articles may be delivered or labor performed, but it is the whole — all the items charged constituting the account. It is not closed until the dealings between the parties have ceased, or until it is done by some other act by them performed.² It is kept in a regular book of accounts,

¹ Whitwell v. Willard, 1 Metc. 216.

² James v. Richmond, 5 O. 387.

although it is not essential that the items be so entered, if they are such as usually form the subject of a book account.¹ A statement of a balance is not an account, and the debits and credits must therefore be given.² The proper subjects or items which go to make an account must necessarily depend upon the facts in particular cases and vary with the nature of dealings between parties. It may consist of articles properly the subject of an account, and also other cash items not ordinarily the subject of an account;³ or it may be for work and labor performed, and goods sold and delivered;⁴ or for services and money loaned or paid for the use of another;⁵ or goods sold and delivered and cash paid for shipment, or for the value of goods sold for another on commission;⁶ or rent of real estate, when so considered by the parties, may be the subject of account.⁷ Otherwise, in the absence of any intention of the parties to treat it as an account, an action must be regularly brought for use and occupation as pointed out elsewhere.⁸ A check book is not a book account.⁹ Money of any considerable amount is not the proper subject of a book account;¹⁰ still, if in the course of business small sums are passing between parties, these may with propriety be charged on book, and proved as other items of account.¹¹ An account made out on a loose sheet of paper is not a book account.¹² Where a claim or demand for money arises upon a contract and is for something furnished or performed by one party for

¹ *Black v. Chesser*, 12 O. S. 621-2.

² *McWilliams v. Allan*, 45 Mo. 578.

³ *McKemy v. Goodall*, 1 O. C. C. 23; 13 W. L. B. 295.

⁴ *Dallas v. Fernan*, 25 O. S. 637.

⁵ *Averill Coal & Oil Co. v. Verner*, 23 O. S. 372; *Ralston v. Kohl*, 80 O. S. 92.

⁶ *Dudley v. Geauga Iron Co.*, 18 O. S. 172-3.

⁷ *Nedvidek v. Meyer*, 46 Mo. 600. In *Roe v. Holbert*, 18 S. W. Rep. 416 (Tex., 1892), a suit was filed before a justice on an open account for rent. In *Case v. Berry*, 8 Vt. 382, it was stated that an action would not lie on account for use and occupation of lands. But

where there are mutual dealings and accounts between the parties, and articles are delivered or services rendered which are intended to be applied in payment of rent, then the same may be adjusted in the form of an account. Book debt will not lie for use and occupation. *Beach v. Wills*, 5 Conn. 493.

⁸ See ch. 53, *Landlord and Tenant*, sec. 739. Trial courts in Ohio have sustained demurrer to petition on an account for rent.

⁹ *Wilson v. Goodin*, W. 219.

¹⁰ *Hough v. Henk*, 8 O. C. C. 354.

¹¹ *Cram v. Spear*, 8 O. 496.

¹² *Kennedy v. Ankrum*, Tapp. 8.

another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim is made out in detail in writing and presented to the debtor, such statement constitutes an account.¹

By virtue of statute² a contract granting an option to buy or sell at a future time, when the commodity is not to be delivered, the party losing to pay the difference in the market price, is a gambling contract or wager upon the future price of the commodity, and an account cannot be founded upon such transaction. The fact that one of the parties assumes to make the purchase or sale as a commission merchant merely will not alter the relation, and the loser may recover³ from the winner.⁴ Nothing is more productive of mischievous results than dealings in options in grain or in other commodities, and no subtle finesse of construction ought to be adopted to defeat the penalties against such gambling transactions.⁵

Sec. 149. Payments on account, how treated.— Payments upon a single open current account between parties, not shown to have been made in the discharge of a particular item, are always imputed to the earliest item on the debit side at the time of payment, as the law, upon equitable principles, infers the debtor's intention to appropriate the payment in discharge of the earliest items in the order of their dates.⁶ If a general payment is made, the creditor has the right to elect where to credit it, though the debtor may, where he owes several distinct accounts, direct his payments to either.⁷ Credits on a book account are payments, the balance appearing due is only the debt;⁸ so that payments may extinguish so much of the debt as to reduce it within the jurisdiction of a justice of the peace. A check given in payment of an account will not be so considered where it cannot be collected.⁹ In

¹ *Railway Co. v. Gould*, 44 Kan. 68. *Beveredge v. Hewitt*, 18 Ill. App. 467;

² Sec. 6934a, R. S.

³ Under sec. 4270, R. S.

⁴ *Lester v. Buell*, 49 O. S. 240.

⁵ *Pearce v. Buell*, 118 Ill. 228, 239.

See *Kahn v. Walton*, 46 O. S. 195-210. Contracts to sell but not to be delivered are against public policy. *Irwin v. Willar*, 110 U. S. 499; *Cockrell v. Thompson*, 85 Mo. 510; *McCormick v. Nichols*, 19 Ill. App. 334;

Story v. Solomon, 71 N. Y. 480;

Johnson v. Brown, 2 C. S. C. R. 68.

⁶ *Gaston v. Barney*, 11 O. S. 511;

Cain v. Dietz, 8 O. C. C. R. 612; *Clayton's Case*, 1 Merivale, 572.

⁷ *King v. Andrews*, 80 Ind. 429;

Rogers v. Gumes, 99 Ind. 224.

⁸ *Means v. Smith*, Tapp. 60.

⁹ *Fleig v. Sleet*, 43 O. S. 53.

pleading payment it will be sufficient to allege it generally without stating the amount.¹

Sec. 150. Effect of charges as reflecting on whom credit is given.—The fact that goods are charged upon books to one person is not conclusive evidence that the credit is given to such person.² Thus, if B. furnishes goods to C. on the express promise of A. to pay for them, as if A. says to him, let C. have goods to such an amount, and I will pay you, and the credit is given to A., in that case, C. being under no liability, there is nothing to which the promise of A. can be collateral, and A. being the immediate debtor, it is his original undertaking and not a promise to answer for the debt of another.³ Goods may be sold and delivered to one person and so charged upon the books, yet not sold upon his credit, but upon the credit of a third person. Difficulty may arise in such cases in determining whether or not the undertaking of such third person is collateral, and therefore within the statute of frauds, as being a promise to pay the debt of another; or whether it is an original undertaking and not within the statute. The test is, to whom was the credit given? If no credit be given the party receiving the goods, but is given solely to a third party verbally promising to pay the same, it becomes an original promise and is not within the statute of frauds.⁴

Sec. 151. Pleading in account.—In an action upon an account, the party pleading should set forth a copy thereof, with all credits and indorsements thereon, and state in his petition that there is due him a specified sum which he claims with interest from a certain date.⁵ If the items of account are not numerous they may properly be embodied in the pleading; but if numerous the pleading may state the facts constituting the cause of action, and a copy of the account, appropriately identified, should be attached as pointed out

¹Johnson v. Breedlove, 104 Ind. 521.

²Swift v. Pierce, 13 Allen, 136; Lyon v. Chamberlain, 8 Am. Law Rec. 330; Walker v. Richards, 44 N. H. 388.

³Elder v. Warfield, 7 Harr. & John. 391.

⁴Cahill v. Bigelow, 18 Pick. 369; Walker v. Richards, *supra*; Geary v. O'Neil, 73 Ill. 598. See Cowdin v. Gottgetren, 55 N. Y. 650; Dean v. Tallman, 105 Mass. 443.

⁵O. Code, secs. 5085, 5086. See *ante*, sec. 58; Whittaker's Code, pp. 126-7; Bates' Pldg. 98-104, 193.

elsewhere.¹ The practice of attaching instead of embodying the copy, whether the account be long or short, is commendable and proper. Even though the account has not been entered in a regular book of accounts, it is a sufficient compliance with the statute if the items thereof be set down in the form of an account in the petition.² It is essential that a copy be specific, and distinct claims should not be grouped in one general statement.³ It has been held that if the copy imperfectly describes goods or merchandise, a bill of particulars may be demanded under the code.⁴ The general practice, however, is to reach such matters by motion, as the code provides that when the allegations are so indefinite and uncertain that the precise nature thereof is not apparent, the court may require the same to be made definite and certain,⁵ and this is brought about by motion.⁶

In an action upon an account for attorney's fees it is not necessary to make a statement of each particular item of services rendered, where they refer to one transaction, and state the charge for each item separately.⁷ If, however, the charges are for services in more than one transaction, then the value of the services rendered in each should be stated.⁸ A general demurrer will not lie to a petition which sets forth a cause of action upon an account which contains items properly the subject of a book account, and also other cash items not ordinarily the subject of an account. The proper practice in such cases is to demur to the particular items objected to, or to move to strike them out, and answer as to the others. But where the items not ordinarily the subject of an account are made so by agreement or consent, a demurrer or motion cannot then be filed to them when sued upon, upon the ground that such items are not the subject of book account.⁹ An allegation stating a loan of money to another at his request, and that it

¹ See *ante*, sec. 57.

² *Black v. Chesser*, 12 O. S. 621-2; *Swan's P. & P.*, p. 183.

³ *Goodheart v. Powers*, 1 *Haudy*, 559.

⁴ *Gibson v. Farina Co.*, 2 *Disn.* 499; *R. S.*, sec. 5292.

⁵ *O. Code*, sec. 5088.

⁶ *Trustees v. Odlin*, 8 O. S. 298; 28.

Stoutenberg v. Lybrand, 18 O. S. 298;

Derringer v. Pugh, 7 O. C. C. 158;

Calvin v. State, 12 O. S. 60; *Byers v. Insurance Co.*, 35 O. S. 606.

⁷ See *Form*, sec. 156; *Derringer v. Pugh*, 7 O. C. C. R. 158.

⁸ *Id.*

⁹ *McKemy v. Goodall*, 1 O. C. C. R.

is due and unpaid, or that the defendant is indebted to plaintiff therefor, clearly states a good cause of action, and is beyond the reach of a demurrer or motion.¹ An allegation of an amount due upon an account, after deducting all credits, is a material one in an action upon account,² and must be controverted by answer, or judgment may be rendered without proof.³

In an action upon an account judgment may be entered at any time during the term after the defendant is in default for answer;⁴ and it is not error to so render judgment by default without proof of plaintiff's claim. It is discretionary with the court as to whether or not it will require proof to be made in such a case.⁵

Sec. 152. Ordinary form of petition on account, and notes on evidence.—

[Caption.]

A. B., plaintiff, says there is due to him from C. D., defendant, on the account, a copy whereof is hereto annexed and herewith filed, marked "Exhibit A," the sum of — dollars, which he claims with interest thereon from the — day of —, 18—, for which with costs he prays judgment.

NOTE.—This is substantially the old code commissioner's form, and the one used by many practitioners, and a sufficient statement of facts, and the most convenient when the account is lengthy.

Another is:

The above-named plaintiff, — —, says that the above-named defendant is justly indebted to him in the sum of — dollars, which he claims on an account of which the following is a copy, together with all the credits and indorsements thereon: *[Copy of account.]*

Wherefore this plaintiff demands judgment against the said defendant for the said sum of — dollars, with interest from the — day of —, 18—, and costs.

NOTE.—*Cincinnati v. Cameron*, 33 O. S. 336. See chapter on Petition, secs. 57, 58. Questions of evidence are eliminated from this work, but for convenience of reference the following authorities are here given: An account book of original entries is admissible in evidence in favor of the party by whom it was kept, when shown to be accurately kept; or that it was kept in the usual course of business. *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 18 S. W. Rep. 904 (1892). And as part of the *res gestæ* where the book-keeper testifies that they were correctly kept. *Muckle v. Rennie*, 16 N. Y. S. 208. Or they may be used to refresh one's memory. *Lester v. Thompson*, 91 Mich. 245;

¹ *McKemy v. Goodall*, 1 O. C. C. 27;
Swan's P. & P. 183.

² *Dallas v. Furneau*, 25 O. S. 638.

³ *Lyons v. Fidelity Lodge L. O. F.*,
2 W. L. B. 97.

⁴ O. Code, sec. 5133.

⁵ *Dallas v. Furneau*, 25 O. S. 635.

51 N. W. Rep. 893 (1892). They will serve the purpose of evidence of the non-payment of a claim where no credit appears thereon. *Union School Furn. Co. v. Mason*, 52 N. W. Rep. 671 (S. D., 1892). They cannot be received to negative the payment of cash items. *Schwarze v. Roesler*, 40 Ill. App. 474. Charges of goods to a person to whom they were delivered are not conclusive evidence that they were furnished upon the credit of another who promised orally to pay for them. *Mackey v. Smith*, 21 Ore. 598; 28 Pac. Rep. 974. An account book is not admissible in evidence unless a preliminary foundation has been laid for its admission either as a book of original entries or as part of the *res gestæ*. *Watrous v. Cunningham*, 71 Cal. 30. A merchant's account books are not evidence in his favor as to receipt of money by him. *Oberg v. Breen*, 50 N. J. L. 145; 12 Atl. Rep. 203.

Sec. 153. Petition for goods sold and money advanced.—

Plaintiff says there is due him from defendant for goods and wares sold to said defendant and for money advanced to him, a balance on account, the sum of — dollars, which he claims with interest from —, of which said account the following is a copy, with all credits thereon: [*Copy.*]

Wherefore plaintiff asks judgment, etc., *as in sec. 152.*

NOTE.—From *Weiss v. Emmitt*, supreme court, unreported. As to necessary averments, see *Kerstetter v. Raymond*, 10 Ind. 199; *Abadie v. Carrillo*, 32 Cal. 233; *Magee v. Kast*, 49 Cal. 141; *Smith v. Holmes*, 19 N. Y. 271; *Roberts v. Treadwell*, 50 Cal. 520; *Wilkinson v. Moore*, 20 Kan. 588.

Sec. 154. For labor performed and materials furnished.

Plaintiff says that on the — day of —, 18—, the defendants were indebted to him for labor performed and materials furnished in the manufacture of [*describe goods*], of the value of \$—, and one [*describe other goods*], of the value of \$—, which, on or about the — day of —, 18—, the defendants had ordered the plaintiff to manufacture for them, and which price so mentioned the defendants had agreed to pay plaintiff therefor; yet the said defendants, though often requested, have not paid the plaintiff said sum of \$—, nor any part thereof.

Second cause of action: [Formal averments.]

Plaintiff further says that on the — day of —, 18—, the defendants were and still are indebted to the plaintiff in the sum of \$— for work and labor by the said plaintiff before that time performed and bestowed in the manufacture of [*describe goods*] for the said defendants, and at their special instance and request, and also for divers materials and other necessary things by the said plaintiff before that time found and provided in and about that work and labor for the said defendants, and at their like request, and which said sum of money the said plaintiff avers was then and still is due and payable; yet the said defendants, though often requested, have not paid said sum of money nor any part thereof.

Plaintiff further says that a detailed statement of the labor so performed and materials so furnished by the plaintiff is hereto attached [*or copied, if so desired, as in ante, secs. 151,*

156], and that the said labor and materials are well worth the several amounts claimed herein and therein charged.

Wherefore plaintiff prays judgment against defendants for said sum of \$—, together with interest thereon from the — day of —, 18—.

NOTE.—See another Form approved in *Farron v. Sherwood*, 17 N. Y. 227. The code has not changed the rules of pleading as to right of a party who has performed a special contract. He may also sue upon implied contract, and is not bound to declare on special contract. See, also, *Wilkins v. Stidger*, 22 Cal. 284. See as to statement of facts in such cases, *Busta v. Wardall*, 53 N. W. Rep. 418 (S. D., 1892).

**Sec. 155. Petition on account against partnership —
Averment as to acknowledgment of correctness.—**

For a cause of action herein plaintiff says that during the period embraced in the account hereinafter set forth [*or*, a copy of which is hereto attached, marked Exhibit A] said defendants — and — were partners as —, doing business as — in the state of —; that during the existence of said partnership there were numerous commercial transactions, a true copy of the account of which transactions between the plaintiff and said defendants, — and —, is as follows: [*copy of account*], [*or*, is attached]; that there is now due and owing to said plaintiff from said defendants an unpaid balance on said account of — dollars, which he claims with interest from —, 18—.

Plaintiff further says that on the — day of —, 18—, the defendants above named acknowledged the correctness of the account attached hereto, and promised to pay the same by an instrument in writing.

Wherefore plaintiff prays judgment, etc.

NOTE.—From *Kerper v. Wood*, 48 O. S. 613. See rules stated in sections 57, 58, and 151, *ante*, as to pleading by copy. The record of this case discloses the fact that the plaintiff in the trial court filed an amended petition setting out the fact that the defendants acknowledged the correctness of the account sued upon, and promised to pay the same by a promissory note, a copy of which was embraced in the amended petition. This was on motion stricken from the files and leave granted to file an amendment to the original petition upon the condition that the cause of action should not be changed. A plaintiff cannot amend a petition on account by setting forth a note given in settlement thereof. The allegation given in the foregoing form was allowed, however, in the case above cited.

Sec. 156. Petition on account for attorney's fees.—

Plaintiffs say there is due them from the defendant the sum of — dollars for professional services rendered by them as attorneys at law to him, at his request, between — and —, "in examining records and the law, giving an opinion and furnishing an abstract of the defects in a certain tax title and tax deed claimed and held by one — to the real estate of the defendant, and counseling and advising

him in relation thereto,"¹ or for professional services in learning and preparing the facts, ascertaining and preparing the law for, prosecuting and trying a case in the court of — entitled — [*give action*]; and preparing for and arguing a motion for a new trial in said court, and preparing for and arguing the case in the — court of — county, and other work done by them in said cause in the line of their duty as attorneys.²

Wherefore, etc.

Sec. 157. For services rendered as auctioneer and money expended.—

The plaintiff states that there is justly due to him from the defendant the sum of — dollars, which he claims with interest from the — day of —, 18—, at the rate of — per cent. per annum, on a balance of account, a copy of which is as follows [*or, is hereto annexed, according to sec. 57, ante*]. for services rendered as auctioneer, and for money paid out and expended by the said plaintiff for the said defendant at his special instance and request, and which said sum of money the said plaintiff avers was due and payable on the — day of —, 18—, and yet the said defendant, though often requested, has not paid said sum of money, nor any part thereof.

Wherefore the plaintiff prays judgment, etc.

NOTE.—*Ralston v. Kohl*, 80 O. S. 92. Where services have been rendered under a special contract which has been wrongfully terminated, recovery may be had as upon an implied *quantum meruit*. 80 O. S. 92. Licensed auctioneers must render quarterly accounts of all property sold by them, the amounts realized from such sales and for whom they were made, verify the same, and file with county treasurer and a duplicate copy to the county auditor. R. S., secs. 4231-32.

Sec. 158. Action by assignee of account.—The code³ provides that actions must be brought in the name of the real party in interest.⁴ The assignee of an account is a legal holder, his title being a legal, not an equitable one, as before the code. The incidents of inviolability which attach to commercial paper do not affect an assignee of accounts. The debtor may, however, dispute the indebtedness and also the fact of validity of the assignment.⁵

¹ *Derringer v. Pugh*, 7 O. C. C. R. 158. value of services upon an express contract, however. See "Contracts."

² *Holmes v. Holland*, 29 W. L. B. 115. The petition in the case just cited was for the recovery of the

³ R. S., sec. 4993.

⁴ See, also, sec. 8, *ante*.

⁵ *Allen v. Miller*, 11 O. S. 374-7.

While it has been said that the ruling in *Sargent v. Railroad Co.*,¹ that extrinsic facts showing title to a note need not be expressly averred, is broad enough to cover account also,² it is now considered better practice to include an averment as to the assignment, as follows:

That on the — day of —, 18—, for a valuable consideration, said — — sold, transferred and assigned said account to this plaintiff.³

Sec. 159. Limitation of action on.—An action upon account must be brought within six years.⁴ The right of action accrues and the statute, therefore, begins to run on each item from the day of its proper date—that is, from the day of the delivery of the article or work done or money furnished; and the action will be barred in six years unless it is taken out of the statute on some special ground. Part payment, or a written acknowledgment of liability, or a promise to pay the same in writing, will take it out of the statute.⁵ In order that items of credit appearing upon an account, such as: “1870. By one churn, \$7.” “1870, July 5th. By his account rendered, \$19.65.”—dated long after the account is barred, shall be available against the statute, it must appear that there was an agreement by the parties that such credits were to be treated as part payment thereof.⁶ Items of credit in an account book of the deceased, made after the statute had barred an action, constitute no evidence that it was the intention of the parties that the articles should be applied on the barred account.⁷ It is the act of payment on account of the debt which takes the case out of the statute.⁸ A defendant pleading the statute in an action on a running account may introduce in evidence separate bills and receipts given after the last item of account sued on, as tending to prove that neither party recognized the payment as an admission of the correctness of any former account.⁹

¹ 33 O. S. 449.

² *Bates' Pldg.*, p. 284.

³ *Bay v. Saulspauagh*, 74 Ind. 397.

⁴ R. S., sec. 4981.

⁵ R. S., sec. 4992; *Courson's Ex'rs v. Courson*, 19 O. S. 454.

⁶ *Kaufman v. Broughton*, 31 O. S.

424-8; *Waugh v. Cope*, 6 M. & W. 824.

⁷ *Kaufman v. Broughton*, 31 O. S. 429.

⁸ *Blanchard v. Blanchard*, 129 Mass. 562.

⁹ *Schock v. Bieler*, 5 O. C. C. R. 49.

Sec. 160. Account stated defined.—An account stated is merely the admission of a balance due from one party to another, or an account which has been examined by the parties thereto and all items found to be true, and a just and true balance struck, and a mutual assent or agreement thereto.¹ The mutual agreement to the balance may be implied from the retention of an account rendered for a reasonable time without any objections thereto.² What is a reasonable time is said to be a question of law, but must necessarily depend upon the circumstances of each case,³ and is open to explanation.⁴ Assent may be implied from circumstances,⁵ but there must be proof either express or implied.⁶ It is not necessary that the parties should sign the account.⁷

A partial accounting without striking a balance is not an account stated.⁸ If a debtor writes upon an account which has been rendered him, and which he has retained, a word meaning "balance," subsequent payment of a portion thereof and a failure to dispute any item will make it an account stated;⁹ and so will the retention of an account rendered at the time of the delivery of goods, or at the end of each month, with a statement of a balance, without objection;¹⁰ or a verbal acknowledgment of a monthly account rendered and the giving of a written acknowledgment of the debt.¹¹ Where an objection is made to an item in an account at the time of its rendition, and the balance so rendered is carried into subsequent accounts, payment of such balance under an agreement that the disputed item should remain open, the

¹ *Union Bank v. Knapp*, 15 Am. Dec. 181; *Tassey v. Church*, 89 Am. Dec. 65; *Langdon v. Roane*, 41 Am. Dec. 60; *Anding v. Levy*, 57 Miss. 51; 84 Am. Rep. 435.

² *Wiggins v. Burkham*, 10 Wall. 129; *Quincey v. White*, 68 N. Y. 870; *Bobson v. Bohm*, 22 Minn. 410; *Langdon v. Roane*, 41 Am. Dec. 60; *Stenton v. Jerome*, 54 N. Y. Super. 485; *Freeman v. Howell*, 50 Am. Dec. 561; *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81.

³ *Wiggins v. Burkham*, *supra*.

⁴ *Guernsey v. Rexford*, 68 N. Y. 631.

⁵ *McCall v. Nave*, 52 Miss. 494.

⁶ *Stenton v. Jerome*, 54 N. Y. 490.

⁷ *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81; *Brown v. Van Dyke*, 55 Am. Dec. 250.

⁸ *Bouslog v. Garrett*, 89 Ind. 338.

⁹ *Holler v. Apa*, 17 N. Y. Supp. 504.

¹⁰ *Robbins v. Downey*, 18 N. Y. Supp. 100.

¹¹ *Mackay v. Kahn*, 17 N. Y. Supp. 508.

accounts so rendered are not regarded as accounts stated as to the disputed item, and may be corrected after settlement.¹ Balancing an account without the consent of both parties will not constitute an account stated.² A mere proposal to extend the time of payment, not acted upon, will not change the character of an account stated.³

Sec. 161. Account stated may be opened.—A mistake, fraud, omission or inaccuracy will deprive an account stated of its conclusive character and render it subject to a re-examination;⁴ but the right of a party to so open the account may be lost by his own silence or acquiescence.⁵ When there is clear and convincing proof of fraud or concealment, courts will open an account barred by the statute of limitations, but these matters must be specifically alleged in the pleadings.⁶ A party alleging a mistake in an account must point out the error of which he complains,⁷ and must furnish the data whereby it may be corrected.⁸ An account stated cannot be opened for a mistake in law.⁹

Sec. 162. Pleading account stated.—In pleading an account stated the plaintiff must aver that the same has been balanced with the assent of the parties,¹⁰ but it is not necessary to allege a promise to pay.¹¹ An account is not available as an account stated unless it is specially pleaded as such.¹²

¹ *Dudley v. Iron Company*, 13 O. S. 168.

² *Nostrand v. Ditmis*, 127 N. Y. 355; 28 N. E. Rep. 27.

³ *Lawson v. Douglas*, 17 N. Y. Supp. 4.

⁴ *Sampson v. Freedman*, 103 N. Y. 499; *Scioto Co. v. Gerky*, W. 493; *Fowler v. Pratt*, W. 206; *Hawley v. Harran*, 79 Wis. 379; 48 N. W. Rep. 676; *Fleischner v. Kubli*, 20 Oreg. 328; 25 Pac. Rep. 1086; *Frankel v. Mather*, 58 Hun, 548; *Farnham v. Brooks*, 9 Pick. 212; *Goodwin v. U. S. Ins. Co.*, 24 Conn. 591; *Roberts v. Totten*, 13 Ark. 609.

⁵ *Cross v. Savings Bank*, 66 Cal. 462.

⁶ *Lockwood v. Thorne*, 11 N. Y.

170; 62 Am. Dec. 81; *Wilde v. Jenkins*, 4 Paige Ch. 481.

⁷ *Zent v. Watts*, 1 N. Y. S. 702; *Barker v. Hoff*, 52 How. Pr. 382; *Warner v. Myrick*, 16 Minn. 91; *Mayo v. Bosson*, 6 O. 525.

⁸ *Chubbuck v. Varnum*, 43 N. Y. 432; *Insurance Co. v. Carpenter*, 49 N. Y. 668.

⁹ *Commissioners v. Gherky*, W. 493.

¹⁰ *Volkening v. De Graaf*, 51 N. Y. 268.

¹¹ *Heinrick v. Englund*, 34 Minn. 395; s. c., 26 N. W. Rep. 122.

¹² *Oregon R. & Nav. Co. v. Swinburne*, 22 Oreg. 574; 30 Pac. Rep. 323, 328 (1892); *Bump v. Cooper*, 10 Oreg. 81; 26 Pac. Rep. 648 (1891); *McCormick, etc. Co. v. Wilson*, 39 Minn. 467; 40 N. W. Rep. 571 (1888).

Sec. 163. Petition on account stated.—

Plaintiff says that on the — day of —, 18—, an account was stated between the plaintiff and defendant, upon which accounting the said defendant was found to be indebted to the plaintiff in the sum of — dollars (of which amount said defendant paid the sum of — dollars, and there is now due plaintiff from the said defendant the sum of — dollars with interest from the — day of —, 18—). [*Or, that defendant has not paid the said amount so found due or any part thereof, and there is due plaintiff from the said defendant the sum of — dollars, with interest at — per cent. from the — day of —, 18—.*]

[*Prayer.*]

Sec. 164. Petition to correct account stated and for judgment on account as corrected.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, an account was stated between the plaintiff and defendant, upon which there was found to be due from the defendant to the plaintiff the sum of — dollars, which sum the defendant agreed to pay the plaintiff.

That after the adjustment and settlement of said account plaintiff discovered that it was erroneously stated in this, to wit: [*Specify error claimed.*] Plaintiff did not discover said error until the — day of —, 18—, when he immediately demanded a restatement of said account and requested defendant to correct the same, which he refused to do.

That the account should be corrected as follows: [*state how*], and the balance due thereon to plaintiff should be the sum of \$— instead of \$—, as shown by said account as it is now adjusted.

Wherefore the plaintiff prays that the said error may be corrected as herein set forth, and that he may have judgment against the defendant for the sum of \$— with interest from —.

Sec. 165. Answer and cross-petition claiming set-off for services rendered.—

[*Caption.*]

The said defendant, for his defense and by way of set-off, says: That in —, 18—, the said plaintiff employed the defendant to act and serve as [*state services*] for plaintiff in and about said plaintiff's divers business places in the —, and county of —; that for such services so to be rendered the plaintiff agreed with the defendant to pay him [*state*

amount], that he should be so engaged in said service; that by the terms of said agreement between said plaintiff and defendant, said defendant was to devote to said service of said plaintiff [*state time*], and at the end of said service said plaintiff was to settle with and pay the defendant for said services according to the terms of said agreement and employment; that in pursuance of said agreement and arrangement the defendant, on the — day of —, 18—, entered on the performance of said service for said plaintiff, and duly performed all the terms of said agreement and engagement on his part, and served said plaintiff, as such [*repeat service*], from that day, to wit, —, until and including the — day of —, 18—, making in all [*time employed*]; that at the end of said service the defendant requested the plaintiff to settle with and pay him for said services according to the terms of said contract, but said plaintiff refused and still refuses to pay him therefor, or for any part thereof; that by reason of the premises there is due and owing to said defendant, from said plaintiff, the sum of \$—, with interest thereon from the — day of —, 18—, which he asks may be set off against said claim of said plaintiff, and that he may have judgment against plaintiff for balance.

Sec. 166. Answer setting up statute of limitations.—

[*Caption.*]

The alleged cause of action set forth in said petition did not accrue within six years next preceding the date of filing said petition, and the action is therefore barred by lapse of time.

Sec. 167. Answer of settlement by note.—

[*Caption.*]

[*Formal opening.*] That before the bringing of this action the plaintiff and defendant had a full and final settlement of all their accounts, including the items of account sued on herein, and it was found that defendant was indebted to the plaintiff in the sum of — dollars, for which sum defendant then and there executed to the plaintiff his promissory note, payable — days after the — day of —, 18—, in full satisfaction of the amount so found to be due him.

[*Prayer.*]

NOTE.— A note given by a member of a firm after dissolution in settlement of a balance on an account due from a partnership prior to dissolution is not such a promise as the Code, section 4992, provides may take a demand on account out of the statute of limitations, as to the other members, unless there was an express authority to execute the note. *Kerper v. Wood*, 43 O. S. 618. A promise inferred from a payment cannot have greater effect than an express promise. *Shoemaker v. Benedict*, 11 N. Y. 176, 186. A partial payment by one of several makers of a note will not prevent the statute from running. *Hance v. Blair*, 65 O. S. 349.

Sec. 168. Answer setting up fraud or mistake in account stated.--

[*Caption.*]

Defendant says that he admits that he had an accounting with said plaintiff on the — day of —, 18—, and that the sum of — dollars was found to be due said plaintiff upon said account; but says that at the time of said accounting there were certain errors and false charges, of which this defendant was wholly ignorant, by mistake and oversight, made in said account in the following particulars: He is entitled to the following credits, which were wholly omitted from said account: [*States them.*]

That the following items of said account were wrongly and fraudulently charged against defendant by the plaintiff: [*States them, showing the errors and facts evidencing fraudulent character of charges.*]

That on the — day of —, 18—, defendant notified the plaintiff thereof, and requested that the same be corrected and the account restated, which plaintiff refused.

Sec. 169. Judgment on account.—In an action upon an account, judgment may be entered at any time during the term after the defendant is in default for answer, unless the court gives further time to answer.¹ It is not reversible error to render judgment on default, in an action on account, without proof of plaintiff's claim.²

¹ R. S., sec. 5133.

² See *ante*, sec. 87; *Dallas v. Fermeau*, 25 Q. S. 635.

CHAPTER 13.

ACCOUNTING.

Sec. 170. Accounting—When and by whom invoked.	Sec. 173. Petition against agent for accounting.
171. Parties.	174. Petition for an accounting between partners.
172. Some rules of pleading in accounting.	

Sec. 170. Accounting—When and by whom invoked.—
This is an equitable remedy which is resorted to where there have been mutual dealings between parties and a controversy has arisen between them in reference to accounts which are of such a complicated nature that courts of law cannot afford relief. Under the code, however, where a petition sets forth an account containing numerous items and payments, which is controverted by answer, the parties may have both an equitable and legal remedy, according to the nature of the case, and the court may order a reference to a master to take and state the account without the consent of either party.¹

A holder of stock in pledge as collateral security is nevertheless required to account to the owner thereof, or to the *cestui que trust*, for any surplus remaining after the payment of the debt;² and this rule is applicable to other pledges.³ Where complications or difficulties arise between parties sustaining a fiduciary relation, an accounting may be compelled, as between factor and principal,⁴ or administrators, executors and creditors, legatees or next of kin of a deceased person,⁵ or between guardian and ward.⁶

The commission of joint executors of an estate may be ad-

¹ *Stanley v. Cincinnati*, 1 Cin. S. C. R. 69; *Roots v. Nye*, 2 Handy, 229; *Johnson v. Wallace*, 7 O. S. 62. As to method of trial, see *Black v. Boyd*, 50 O. S. 46; *Chapman v. Lee*, 45 O. S. 356.

² *Lee v. Bank*, 2 Cin. S. C. R. 300.

³ *Kingsbury v. Phelps*, W. 370.

⁴ *Roots v. Nye*, *supra*.

⁵ *Cram v. Green*, 6 O. 480; *Wood v. Brown*, 84 N. Y. 337; *Petree v. Lansing*, 66 Barb. 357.

⁶ *Armstrong v. Miller*, 6 O. 119; *Davies v. Lowrey*, 15 O. 655; *Hendry v. Clardy*, 8 Fla. 77.

justed by a petition for an accounting where one has received all of it;¹ and if an administrator purchases land at his own sale he must account to the heirs for the property and its price, or a vendee to whom such administrator has sold it must also account to the heirs for its value at the time of its original purchase.²

A stockholder may, in a suit in equity against a corporation, join other stockholders and compel an accounting to be taken of all stocks and funds;³ or an assignee of a mortgage debt, who has taken from the mortgagee a deed for part of the property as part payment of the mortgage debt, may be compelled to account to the assignor for its full value if necessary to the payment of the mortgage.⁴

A mortgagee in possession of premises covered by the mortgage is regarded as the steward or bailiff, as it were, of the mortgagor, and, as such, accountable to him or his assigns, or mortgagee, for the profits;⁵ but a mortgagee who has rightfully recovered possession of property by proper proceedings cannot be charged in an action against him for an accounting with the full value of the property at the time it was replevied by him; and if he has sold it he should be charged only with what he received, if the sale was fair and reasonable.⁶ A grantee of a mortgage holding the right of redemption who is not made a party to foreclosure proceedings may compel a purchaser of the premises who thereby claims possession to account for rents and profits.⁷

The state may authorize a suit to be brought against it, by an act of the legislature, for the adjustment of a claim which an individual has against it.⁸ Members of an association who have abandoned the enterprise without notice may be compelled to render an account to such association of their earnings and profits while working separately;⁹ and where parties who have been engaged in a common enterprise, sharing profits upon a final adjustment or settlement at the close of their

¹ *Spiers v. Wisner*, 88 Mich. 614; 50 N. W. Rep. 654.

⁵ *Anderson v. Henry*, 27 O. S. 104.

⁶ *Armstrong v. McAlpin*, 18 O. S.

² *Glass v. Greathouse*, 20 O. 508; 184.

Barrington v. Alexander, 6 O. 189;

⁷ *Childs v. Childs*, 10 O. S. 839; *Mc-*

Devoue v. Fanning, 2 Johns. Ch. 252;

Arthur v. Franklin, 16 O. S. 198

Mitchell v. Dunlap, 10 O. 120.

⁸ *Hampson v. State*, 8 O. S. 315.

⁹ *Taylor v. Exporting Co.*, 5 O. 162.

⁹ *Eagle v. Butler*, 6 O. S. 295.

⁴ *Fithian v. Corwin*, 17 O. S. 118.

business, the same must be made by a full and complete statement of the whole business, and not as if settlements had been made from time to time between them.¹

An accounting cannot be had where a partnership is denied and its existence appears to be uncertain;² nor can a retired partner compel an accounting to be made by a new firm to the old firm, which assumed all liabilities and agreed to collect and account for all outstanding bills, in which they may have failed—his remedy is an action at law for damages in failing to render such account;³ nor can a legatee of a deceased partner compel a surviving partner to make an accounting, unless the legal representative of such deceased partner has refused to bring the suit.⁴ A cause of action of one partner against his copartner for an account accrues upon dissolution,⁵ and a suit for an accounting cannot be maintained by parties claiming to be an existing partnership, where it appears that they have become an incorporated body, which has not been dissolved.⁶ Damages for false representations on the sale of property cannot be taken into consideration in a suit for an accounting, as a person cannot in equity be made a debtor by fraud.⁷

Sec. 171. Parties.—All persons interested in obtaining an accounting, or in the result, should be made parties,⁸ even though not interested in the same right.⁹ A creditor, secured in a deed of trust, in an action for an account of the fund, should make all creditors in the same class with him parties.¹⁰ In an accounting between partners all the members should be joined.¹¹ In an action against a guardian by one of several wards all the others should be joined.¹² And in an accounting between joint owners of property judgment creditors should be made parties.¹³ If the pleadings show others beside the

¹ Gill v. Geyer, 15 O. S. 399.

⁷ Holt v. Daniels, 61 Vt. 89; 17 Atl.

² Walcott v. Watson, 53 Fed. Rep. Rep. 786 (1889).

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³ Stein v. Benedict, 83 Wis. 603; 53 N. W. Rep. 891 (1893).

⁸ Petrie v. Petrie, 7 Lans. 90; Ferrer v. Barrett, 4 Jones' Eq. 455

⁴ Lake v. Barnes, 18 N. Y. Supp. 471.

⁹ Little v. Sayre, 7 Hun, 485.

⁵ Gray v. Kerr, 46 O. S. 652.

¹⁰ Murphy v. Jackson, 5 Jones' Eq. 11.

⁶ Benninger v. Gall, 1 Cin. S. C. R.

¹¹ Derby v. Gage, 38 Ill. 27.

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¹² Hendry v. Clardy, 8 Fla. 77.

¹³ Benson v. Stein, 34 O. S. 294.

plaintiff interested, the defendant may require such persons to be made parties.¹

Sec. 172. Some rules of pleading in accounting.—A plaintiff seeking an accounting must allege specifically that he has made a demand therefor, or that he is ignorant of the condition of the account and is unable to ascertain it.² If a defendant in an action desires to have an accounting he must clearly set forth his right thereto in order to avail himself of that privilege;³ but in matters of a complicated nature, where the parties are numerous, it may be quite impossible, if not undesirable, that all the claims of the various parties as to the different items proposed for adjudication should be made a matter of distinct averment in the pleading;⁴ nor is it essential that a detailed history of the dealings of the parties be averred.⁵ A person whose duty it is to keep an account who claims a balance due thereon upon accounting must by his pleading show how the same is produced, and cannot call others to an account until he himself has performed his duty and rendered an account.⁶ Facts showing liability under certain conditions should be set forth in a petition by the creditors of an insolvent corporation for an accounting and to compel the stockholders to contribute upon their unpaid subscriptions when the same is made upon condition.⁷

The petition in an accounting should state that the plaintiff has had mutual dealings with the defendant, the time when their last settlement occurred, and that the plaintiff has applied to the defendant for a settlement of their accounts. The petition may be in the manner following:

Plaintiff and defendant have had mutual dealings for — years, each keeping his own accounts, which are of a complicated nature.

Plaintiff states that on the — day of —, 18—, he offered to produce to the defendant his accounts and requested defendant to produce his in order that they might come to an adjustment and settlement of the same, which the defendant wholly failed and refused to do, and so said accounts therefore remain in an unsettled state. That there is due the

¹ Southal v. Shields, 81 N. C. 28.

⁵ Holladay v. Elliott, 8 Ore. 340.

² Kennicott v. Leavitt, 87 Ill. App.

⁶ Wood v. Boney, 21 Atl. Rep. 574

435; Claypoole v. Gish, 108 Ind. 424; (N. J., 1891).

Dodds v. Vannoy, 61 Ind. 89.

⁷ Mathis v. Pridham, 20 S. W. Rep.

³ Bailey v. Bergen, 4 T. & C. 642.

1015 (Tex., 1892).

⁴ Babcock v. Camp, 12 O. S. 11, 86.

plaintiff a balance on their said mutual accounts in the sum of — dollars.

Wherefore plaintiff prays that the defendant may be ordered to render an account and that he may have judgment for any balance found due him, etc.

Sec. 173. Petition against agent for accounting.—

Plaintiff says that on the — day of —, 18—, he employed the defendant as his agent to [*state nature of business and what was done*]. Defendant has [*state the work performed and completion of same*], but neglects and refuses to make and render an account of his transactions as such agent.

That on the — day of —, 18—, plaintiff requested said defendant to account to him for the money by him received and pay over the same, but that he refused and still refuses to comply with said request.

Plaintiff therefore prays that the said defendant may be required to render an account of his said dealings as such agent to plaintiff, and have judgment for the amount which may be found due with interest from the — day of —, 18—, besides the costs of this suit.

Sec. 174. Petition for an accounting between partners.—

[*Caption.*]

1. Plaintiff says that on the — day of —, 18—, he entered into a partnership with the said defendant under the name and style of P. M. & Co., for the purpose of carrying on the business of [*state nature of business*] at —, for the term of — years next thereafter.

2. That plaintiff paid in as his share of capital in said business the sum of — dollars, and said firm, at the date aforesaid, commenced business at —, and continued the same.

3. [*Here state the nature of the difficulties and what is desired to have an accounting upon.*]

4. That plaintiff has requested and demanded of said defendant to make and render a statement and account of his said dealings as such partner, as hereinbefore set forth, but that said defendant has wholly failed and refused so to render an account or to pay over to this plaintiff the amount of money due him.

5. Wherefore the plaintiff prays that the defendant may be compelled to account with him as to his said dealings in the premises, and that he may be ordered to pay over to plaintiff any money found in his hands and due this plaintiff, and for such other equitable relief as is proper.

NOTE.— This may serve as a general outline for such a petition. See form in particular case, used by Maxwell, p. 595. Plaintiff must aver an indebtedness or a probable indebtedness. *Hunt v. Gordon*, 52 Miss. 194. A partner who substitutes the partnership for his individual liability on an accommodation paper is accountable to his copartner for any consequent loss. *Smith v. Loring*, 2 O. 440.

CHAPTER 14.

AGENTS.

Sec. 175. Rights and liabilities of an agent.	Sec. 178. Petition against agent for disobeying orders.
176. Petition against agent for failure to account for goods sold.	179. Petition against agent for not rendering account.
177. Petition by agent for compensation for services.	180. Petition against <i>del credere</i> agent.
	181. Petition against agent for selling goods on credit.

Sec. 175. Rights and liabilities of an agent.— Either principal or agent may be held responsible for a fraud committed by the latter within the scope of his authority.¹ In other cases an election must be made. Thus, where an agent makes a contract in his own name without disclosing his principal, suit cannot be brought against both agent and principal upon discovering the latter, but an election must be made. It may be true that the agent is primarily liable, but as the contract was made for the benefit of the principal he may be held responsible at the election of a third party.² Both principal and agent, however, cannot be held;³ and having, therefore, elected to hold the latter, he cannot afterwards recover of the principal.⁴ The mere commencement of an action against the one or the other will not of itself be considered an election, but may only be considered as having been made when satisfaction has been obtained from the one or the other.⁵ To avoid personal liability an agent should disclose his agency and the name of his principal.⁶ If he acts without

¹ *Maple v. Railroad Co.*, 40 O. S. 313.

² *Lee v. Insurance Co.*, 1 Handy, 317; *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314; *Coleman v. Bank*, 58 N. Y. 393; *Lancaster v. Ice Co.*, 153 Pa. St. 427.

³ *Silver v. Jordon*, 136 Mass. 319; *Schepflin v. Dessar*, 20 Mo. App. 569.

⁴ *Schepflin v. Dessar*, *supra*; *Clealand v. Walker*, 11 Ala. 1058; 46 Am. Dec. 238.

⁵ *Maple v. Railroad Co.*, 40 O. S. 313; *Cobb v. Knapp*, 71 N. Y. 343; 27 Am. Rep. 51.

⁶ *Wheeler v. Miller*, 2 Handy, 149.

authority, though in good faith, he is personally responsible to those ignorant of his want of authority.¹ There is in fact an implication of warrant of authority on his part, so that he becomes personally liable for a breach therein,² and he is liable for disobeying the orders of his principal.³ An agent may sue in his own name when the contract is so made;⁴ or when he loans money, taking security therefor in his own name.⁵ An attorney acting as agent may sue and be sued as other agents;⁶ or when a note is made payable to one as agent.⁷ Unless the contract shows who the principal is, suit must be brought thereon by the agent.⁸ And an agent having a contract upon which he may bring an action may sue for the use of his principal.⁹ An agent is personally responsible when signing his name as agent to an instrument in which the name of the principal does not appear.¹⁰ He cannot be held liable for false representations as to land when he states that his information is obtained from his principal.¹¹ And if an agent pays money to his principal after having been notified not to do so he is liable therefor.¹²

Sec. 176. Petition against agent for failure to account for goods sold.—

That on the — day of —, 18—, the plaintiff delivered to the defendant, at his request, the following goods, viz. [*describe goods*], belonging to the plaintiff, and of the value of \$—, to be sold for cash by said defendant for compensation to be paid to him by plaintiff.

That said defendant sold goods between the — day of —, 18—, and the — day of —, 18—, but has failed to account for the same to the plaintiff.

¹ Trust Company v. Floyd, 47 O. S. 525.

² Noe v. Gregory, 7 Daly, 288; White v. Madison, 26 N. Y. 117; Paterson v. Lippencott, 47 N. Y. 457. Cf. Cole v. O'Brien, 51 N. W. Rep. 316.

³ Whitney v. Express Co., 104 Mass. 152.

⁴ Arcade Hotel Co. v. Wiatt, 1 O. C. C. 58.

⁵ Barb Wire Co. v. Purcell, 48 Kan. 267.

⁶ Gray v. Publishing Co., 21 N. Y. S. 967.

⁷ Cocke v. Dickson, 26 Am. Dec. 214.

⁸ Manette v. Simpson, 15 N. Y. S. 448.

⁹ Burke v. Steel, 40 Ga. 217; Cross v. Johnson, 65 Ga. 717. Contract as to sale of real estate. Wightman v. Bancroft, 22 O. S. 172.

¹⁰ Collins v. Insurance Co., 17 O. S. 215; Anderton v. Shoup, 17 O. S. 125.

¹¹ Griffing v. Diller, 21 N. Y. S. 407.

¹² Carter v. Stork, 18 N. Y. S. 470.

That on the — day of —, 18—, the plaintiff demanded of said defendant the amount due plaintiff for said goods, which he refused to pay.

That no part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—.

[*Prayer.*]

Sec. 177. Petition by agent for compensation for services.—

[*Caption.*]

That on the — day of —, 18—, the plaintiff entered into the service of defendant at his request as agent [*state nature of duties*], and continued in his employment for the period of — months, for which the defendant promised to pay him the sum of \$—.

That no part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—, with interest from the — day of —, 18—.

[*Prayer.*]

NOTE.— An agent may sue for services in an ordinary action on account. See *ante*, sec. 152. If acting as agent of two persons he cannot recover from both principals unless both assented to his double agency. *Bell v. McConnell*, 37 O. S. 396; *Capener v. Hogan*, 40 O. S. 203. Where services are voluntarily rendered there can be no recovery. *Chadwick v. Knox*, 31 N. H. 236; 44 Am. Rep. 339.

Sec. 178. Petition against agent for disobeying orders.

[*Caption.*]

That on the — day of —, 18—, the plaintiff, at the request of the defendant, employed him for a certain reward to sell [*state what*], belonging to the plaintiff, which were of the value of \$—.

Defendant thereupon contracted with plaintiff to obey all instructions given him by plaintiff regarding the sale of said goods, and thereupon received the same for the purposes of said sale.

That the plaintiff afterward directed said defendant to [*state nature of employment*].

Plaintiff alleges that the defendant failed and neglected to comply with and carry out the instructions so given him by plaintiff in respect to the sale of said goods, by reason whereof said goods were injured [*state how*], to the damage of plaintiff in the sum of \$—.

NOTE.— See *ante*, sec. 175.

Sec. 179. Petition against agent for not rendering account.—

[*Caption.*]

Plaintiff alleges that on the — day of —, 18—, he employed the defendant O. D. as his agent to adjust, settle and

collect outstanding numerous accounts which plaintiff had against persons within the state of —.

That it was stipulated and agreed, in and by virtue of said contract of employment, that the said defendant was to report his collections monthly, after deducting — per cent. of the amount of his collections as his compensation.

That the defendant, on the — day of —, 18—, undertook said employment, and continued therein until the — day of —, 18—, when he quit said employment.

That during the time defendant was so engaged in said service he collected of the accounts so as aforesaid due plaintiff the sum of \$—. That the compensation for making said collections due him is the sum of \$—, leaving the sum of \$— due plaintiff, which sum the defendant has wholly failed and refused to pay, although said sum has been duly demanded of him.

[*Prayer.*]

NOTE.—An agent receiving money from his principal, even though through an illegal transaction in which he acted as agent, is nevertheless liable therefor. *Norton v. Blinn*, 39 O. S. 145.

Sec. 180. Petition against del credere agent.—

[*Caption.*]

Plaintiff entered into a contract not in writing with the defendant on the — day of —, 18—, by which it was agreed that the defendant, as agent for plaintiff, would receive and sell [*state what*].

That by virtue of said agreement plaintiff consigned said goods to defendant from — to —, 18—, which were to be sold by him, as a *del credere* agent, upon commission, and for cash, defendant having no authority from plaintiff to sell the same upon credit.

Defendant did on the — day of —, 18—, sell to one E. F. \$— worth of the goods so consigned to him upon — months' credit. That the said E. F. at the time of said sale was, and now is, insolvent, and was not then, nor is he now, able to pay for said goods.

There is therefore due plaintiff from the defendant for the goods so by him sold to said E. F. the sum of \$—, for which he asks judgment.

Sec. 181. Petition against agent for selling goods on credit.—

[*Caption.*]

That on the — day of —, 18—, the plaintiff, at the defendant's request, employed the defendant for a certain reward to sell for cash the following goods, viz. [*describe them*], belonging to the plaintiff, of the value of \$—.

That the defendant then promised the plaintiff to sell the same upon the terms aforesaid, and then received said goods

for that purpose. But on or about the —— day of ——, 18——, said defendant, without plaintiff's consent, sold a part of said goods upon credit, and otherwise than for cash, to C. D., for the sum of \$——, which sum is still unpaid, and said C. D. is wholly insolvent.

That the plaintiff has sustained damages in the premises in the sum of \$——.

[*Prayer.*]

CHAPTER 15.

ANIMALS.

Sec. 182. Introductory.

- 183. Damages by trespassing animals.
- 184. Petition for damages from trespassing animals arising from failure to keep partition fence in repair.
- 185. Petition for damages caused by trespassing stock.
- 186. Impounding strays and action for recovery.
- 187. Petition in replevin for the recovery of animals.
- 188. Answer in replevin for recovery of animals impounded.
- 189. Liability of owners of dogs.
- 190. Petition for damages for sheep killed by dogs.
- 191. Petition for damages for injury to person by dog.
- 192. Petition for damages for killing dog.

Sec. 193. Injury to animals by railroad company prior to statute as to fencing.

- 194. Injury to animals by railroads — Under statute as to fencing.
- 195. Petition against railroad company for damages for injuring cattle.
- 196. Petition for damages where injury occurred by reason of failure of railway company to fence.
- 197. Allegation where injury occurs by reason of insufficiency of fences.
- 198. Petition where company failed to whistle or ring bell — Cattle injured at crossing.
- 199. Answer claiming cattle were unlawfully at large.

Sec. 182. Introductory.— It is not the purpose to enter into a full discussion of the law of Ohio relating to animals, common or statutory, but only so far as may be necessary to outline the rights and remedies of parties who may find it necessary to resort to courts for the redress of their grievances in reference to this subject.

Sec. 183. Damages by trespassing animals.— This subject shows the growth of the law as forcibly as any we may have occasion to examine. It illustrates the fact that the necessities of our citizens give rise to law, and that courts formulate and construe it, as occasion requires, for the best interest of the people, and consider and declare the law

in accordance with the circumstances, necessities, habits and understandings of the people. The common understanding prior to the year 1865 in Ohio was, that fences were made to keep animals in, and not to keep those belonging to others out. While it is true that the common law upon this subject had generally been adopted, it was deemed not applicable to the state in its early history. In 1854 there was no law requiring animals to be fenced unless they were of an unruly or vicious character,¹ and the owner of uninclosed ground had to assume the risk of occasional intrusion by animals which happened to be roaming about, as they were at liberty to do; and the owners of such wandering animals assumed the risk of their loss or injury arising from unavoidable accident.² At that time it was considered that the common-law rule requiring owners to keep their animals inclosed at their peril, making them liable in damages when they escaped and caused injury to others, whether the latter's property was fenced or not, was not suited to the conditions of the state and was not therefore followed.³ As the state advanced in population, however, its necessities were different, and the common-law principles upon this subject were adopted. In addition to animals of a dangerous character, which were then required to be kept in an inclosure,⁴ rooting swine were compelled to remain on their master's land;⁵ to which were added others from time to time, such as the horse, the mule, cattle, etc., which were apt to trouble the neighbor's garden.⁶

The statute⁷ makes the owners of animals who are suffered to run at large in violation of law⁸ liable for all damages done by them upon the premises of another, without reference to the fences which may inclose them. This provision is not intended to be in the nature of a penalty,⁹ and the owners of animals running at large are not guilty of any breach of duty under the statute if they are at large without the omission

¹ S. & C. Stat., p. 70.

² *Kerwhaker v. Railroad Co.*, 3 O. S. 172.

³ 3 O. S. 172; *Cincinnati, etc. Railroad Co. v. Watterson*, 4 O. S. 434; *Cranston v. Railroad Co.*, 1 Handy, 196.

⁴ 29 O. L. 467.

⁵ 56 O. L. 77; S. & C. Stat., p. 76.

⁶ R. S., sec. 4202.

⁷ Secs. 4206, 4251.

⁸ Sec. 4202.

⁹ *Railway v. Methven*, 21 O. S. 586.

of reasonable care upon their part.¹ Part owners of a partition fence failing to keep the portion assigned to them in repair, by reason whereof stock from an adjoining inclosure breaks and enters upon the land, are without remedy; and if the stock are breachy or unruly, the party damaged must show that the defect in the fence was not the proximate cause of the damage.²

It is the rule in Ohio that persons who have joint possession or ownership of animals may be sued jointly for damages committed by them, although the several animals are owned separately and individually.³ In suing for damages caused by trespassing cattle by failure to fence, it must be in *assumpsit*, if relying on an express contract to fence; but if on custom or negligence it should be an action on the case.⁴ Where a fence between adjacent owners of premises is good in some places and bad in others and cattle get over the good part, their owner is liable for damage done to the crop of his neighbor. The trespass is the sole wrong of the defendant, as the neglect of the plaintiff to keep all parts of the fence in repair, even though a wrong, does not contribute to the injury.⁵ Ordinarily the owners of animals are not liable for any damages done by them when they are not trespassing, unless they fall within the class of vicious animals, the character of which the owner is aware; when they are out of their place, however, and commit some injury, the owner is liable without respect to their habits.⁶ To charge the owner for an injury done by an animal which is not of a vicious character, it must be alleged, that it was in the habit of committing like injury, of which the owner had knowledge.⁷ A person may have the right to

¹ Railroad Co. v. Stephenson, 24 O. S. 48. v. Sutton, 24 O. S. 333, as to joint owners of dogs.

² Phelps v. Cousins, 29 O. S. 135; Northcott v. Smith, 4 O. C. C. 568-9. ⁴ Mathis v. McCord, W. 647. ⁵ McClean v. McCarthey, 8 W. L. M. 489 (1861).

³ Jack v. Hudnall, 25 O. S. 255. See post, sec. 189; Brady v. Ball, 14 Ind. 317. Ordinarily held that they cannot be jointly sued. Adams v. Hall, 19 Am. Dec. 690; Van Steenburg v. Tobias, 31 Am. Dec. 810; Cogswell v. Murphy, 46 Iowa, 44. See McAdams v. Dickson v. McCoy, 39 N. Y. 401; Dolph v. Ferris, 42 Am. Dec. 246; Goodman v. Gay, 53 Am. Dec. 589; Morgan v. Hudnell, 55 O. S. 552. ⁷ Vrooman v. Lawyer, 13 Johns. 339; Stumps v. Kelly, 22 Ill. 140.

expel animals which are trespassing, but in doing so he must not unnecessarily injure them, as he is liable to their owner for any injury to them, even though the owner of the animal would be liable for the damage caused by them.¹ The act² authorizing certain animals to be killed when they are diseased and past recovery does not prevent the owner from having his property rights in them determined in the proper tribunal.³

Sec. 184. Petition for damages from trespassing animals arising from failure to keep partition fence in repair.—

[*Caption and formal opening.*]

That on the — day of —, 18—, previous thereto, the plaintiff and defendant owned in fee-simple and were in possession of adjoining farms in the township of —, in said county, separated by a partition fence, of which the plaintiff and defendant had by mutual agreement assigned the — half to the plaintiff and the — half to the defendant as his respective portion to keep in repair. That the plaintiff has kept the portion so assigned to him in good repair, but that the defendant has failed and neglected to keep the portion assigned to him in repair, by reason whereof, on the — day of —, 18—, or at divers other times, certain animals [*naming them, according to secs. 4206, 4208*] belonging to the said defendant broke down said portion of said fence so assigned to the said defendant to keep in repair, and entered upon, ate and destroyed the crop of the plaintiff growing on his said tract of land and otherwise injured his said premises; that on the — day of —, 18—, said plaintiff filed his complaint with —, a justice of the peace within and for the said township, who appointed —, — and —, three judicious, disinterested men, residents of the county, to assess the damages so sustained by the plaintiff. That said assessors so appointed, and upon due notice having been given to the defendant, met on the — day of —, 18—, and upon their oaths assessed the said plaintiff's damage for the trespass so done by the defendant's animals [*naming them*] to be paid by the said defendant at — dollars. That on the — day of —, 18—, said plaintiff demanded of said defendant payment of the amount of damages so assessed by said assessors, which the defendant refused and still refuses to pay. Wherefore plaintiff prays judgment for the sum of — dollars with interest from the — day of —, 18—.

¹ Kerwhaker v. Railroad Co., 3 O. S. 172.

² Brill v. Humane Society, 4 O. C. 358.

³ R. S., sec. 3725 A.

Sec. 185. Petition for damages caused by trespassing stock.—

[*Caption and formal opening.*]

That on the — day of —, 18—, the cattle and stock of the defendant W. K. D. trespassed upon the lands of plaintiff in said county, and injured and destroyed growing corn belonging to plaintiff; and that by reason of the stock and cattle of the defendant so trespassing on and destroying the crops of plaintiff, he has sustained damages in the sum of \$—, for which he asks judgment against the defendant.

NOTE.—Demurrer to this form overruled in *Davis v. Wilson*, 11 Kan. 74.

Sec. 186. Impounding strays and action for recovery.—

We are not here concerned much about the provision of the statute in reference to taking up or impounding animals which may be treated as strays,¹ unless the animals which happen to be unlawfully at large get into his master's neighbor's field and are there taken up and held until the owner pays the statutory fee.² If the owner happens to be of a stubborn disposition, instead of paying a dollar he may be compelled to pay considerable more, as instanced by some of the cases, in his attempt by the ordinary proceeding in replevin to gain possession of his animal, rather than pay the small fee stipulated by statute. The right of a land-owner to distrain and hold animals which may be found trespassing upon his land until the damages thereby sustained are paid does not prevail in Ohio as it did at common law.³ Moderation must be exercised in protecting the public from injuries by animals. There is always some reason for their being at large; it may be by some unavoidable accident, or even by the act of God, in which case the owner should be given an opportunity to explain the circumstance; and a city cannot say that, when found in its streets, an officer shall seize and sell them to the highest bidder because of their offense.⁴ Animals are considered at large within the meaning of the statute whether they are so with or without the consent of the owners;⁵ but where the animal passes through the owner's field through a line fence in an adjoining owner's field and from there into

¹ R. S., sec. 4207.

² R. S., sec. 4208.

³ *Northcott v. Smith*, 4 O. C. C. 565.

⁴ *Rosebaugh v. Saffin*, 10 O. 82.

⁵ *Sloan v. Hubbard*, 84 O. S. 588.

the inclosure of another and an adjoining owner, he is not at large within the meaning of the statute and cannot be taken up.¹ And if it be shown that it escaped without the knowledge or fault of the owner, it must be given up on payment of a reasonable compensation for the taking up.²

Sec. 187. Petition in replevin for the recovery of animals.—

[Caption and formal opening.]

Plaintiff says that on the — day of —, 18—, he was and ever since has been the owner of and entitled to the possession of ten head of hogs, of the value of — dollars, and that the said defendant, on or about that date, unlawfully and wilfully did take such hogs and confine them in a pen, being then unfit to put hogs in, being too small, filthy, wet, muddy, and did not properly feed and care for said hogs while they were in said pen, whereby said hogs were then and there damaged to the amount of — dollars. The plaintiff further says that the defendant then lived within one-half mile from him and did then and there well know that the said plaintiff was the owner of said hogs and entitled to the possession thereof, yet wrongfully took and kept said hogs as aforesaid for the space of five days and until they were taken in replevin in this case; and did not give plaintiff notice of having taken and detained said hogs.

Plaintiff also says that the defendant had no right to take up and impound said hogs as thus done in said township of — for the reason that there was then in said township of — a public pound in which persons finding hogs and other domestic animals running at large in said township of —, contrary to the statutes of Ohio, had the right to impound the same.

Plaintiff also says that the defendant, while having possession of said hogs, did not advertise the same, nor give any notice to the clerk of said township of taking possession of said hogs; but that he kept said hogs from said plaintiff for five days as aforesaid. The possession of same was often demanded by plaintiff.

Plaintiff therefore prays that on final hearing of this case this court may adjudge him to be the owner of said hogs and entitled to the possession of same while they were thus detained, and also asks judgment against said defendant for the sum of — dollars, his damages so as aforesaid sustained.

NOTE.— See sec. 4209; Albright v. Payne, 43 O. S. 86. See, also, chapter on Replevin.

¹ Rutter v. Henry, 46 O. S. 272.

² R. S., sec. 4207.

Sec. 188. Answer in replevin for recovery of animals impounded.—

The defendant denies that the said plaintiff was entitled to the immediate possession of said ten hogs on the — day of —, 18—, or at the commencement of this action; and he denies that the defendant then or at any other time wrongfully or unlawfully detained the possession of said hogs. And he denies that he confined said hogs in a pen that was unfit for such purpose, or that said pen was too small, filthy, wet or muddy, or that the defendant neglected to properly feed or in any manner care for said hogs while they were detained or held in his possession, or that said hogs, or any of them, were in any manner damaged in any sum whatever by reason of any fault or neglect of the defendant or otherwise. And he denies that he did not give plaintiff notice that said hogs had been taken up and retained by him, and he denies that there was then or is now within the said township of — a public pound or inclosure in which persons finding hogs or other domestic animals running at large in said township contrary to the statutes of Ohio could impound the same, or that any such inclosure or pound was ever constructed or procured by the trustees of said township.

Sec. 189. Liability of owners of dogs.—As the statutes of Ohio now exist, dogs have assumed the dignity of property, and the owner may maintain an action against any one who injures or kills them,¹ or carries or entices the same away. Damages by way of compensation and also exemplary damages may be allowed in such action. No suits in behalf of dogs have, however, been discovered, but they have been the source of some litigation by reason of injuries which they have inflicted to mankind and their special enemy, the sheep. In one case at least they have been the cause of litigation between their owners, growing out of a fight between their respective dogs, in which it was held that the owner of the dog which provoked the quarrel and caused the fight could not hold the owner of the other dog responsible for the consequences.² It was a rule at common law that an owner of an animal was not liable for an injury committed by it unless he knew that such animal was of a vicious nature and accustomed to commit injuries. Unless this rule be abrogated by statute it is necessary for the plaintiff to aver and prove that the owner has knowledge of the vicious nature of the animal to make a case against a defendant.³ In that event if an animal is not of a vicious char-

¹ R. S., sec. 4214, 93 O. L. 128; 52 O. S. 601.

² Wiley v. Slater, 22 Barb. 506.

³ Glidden v. Moore, 14 Neb. 84. (It was unnecessary under act of

acter, to hold its owner liable for an injury committed by it, it should be alleged that the animal was accustomed to commit similar injuries and that the owner had knowledge thereof.¹ Any one who permits a dog to remain about his premises as if he were his, or who harbors a dog, is regarded as the owner, but not when he is there only temporarily.² An owner of premises is not regarded as a keeper merely because a dog is kept there by his hired man.³ The statute makes the owners of an animal of the dog kind jointly and severally liable to any person damaged by them, and provides that they may be declared to be a common nuisance and killed within twenty-four hours after the rendition of a judgment for damages by a court of justice.⁴ Where the owners of two or more dogs together injure sheep, either one is liable for the whole injury.⁵ An averment in an action for damage that "a certain pack or lot of dogs, owned, harbored and unlawfully kept by the defendants, wounded certain sheep of the plaintiff," is sufficient even though the defendant may have only owned some of the dogs which caused the injury.⁶

Sec. 190. Petition for damages for sheep killed by dogs.

That on the — day of —, 18—, and from thence until and at the time of the damage and injury to the plaintiff hereinafter mentioned, said defendant wrongfully kept a certain dog during all that time, well knowing that said dog was accustomed to attack, bite and injure sheep, cattle, etc.; said dog did attack, chase, bite and worry — lambs, the property of the plaintiff, of the value of \$—, by reason whereof — of said lambs, of the value of \$—, died, and the residue were greatly terrified, damaged and injured, and rendered of no use or value to the plaintiff, to his damage in the sum of \$—.

Wherefore plaintiff prays, etc.

NOTE.—R. S., sec. 4218; *ante*, sec. 189.

March 24, 1860, (S. & C. 41) to aver knowledge by defendant of the animal's vicious propensities—the rule of *scienter* being abrogated. Gries v. Zeck, 24 O. S. 329. This statute has been repealed and has no counterpart in the present statutes.) See *ante*, p. 169, note 6. The text finds support in the recent case of Morgan v. Hudnell, 52 O. S. 552.

¹ Maxwell's Code Pleading, p. 92—3; Boone's Code Pleading, sec. 24.

² Frammell v. Little, 16 Ind. 251; Wilkinson v. Parrett, 32 Cal. 102; Marshall v. Bowman, 62 Ia. 57; Marsh v. Jones, 21 Vt. 378; Barrett v. Railroad Co., 3 Allen, 101.

³ Whittemore v. Thomas, 153 Mass. 347; 26 N. E. Rep. 885.

⁴ R. S., sec. 4213; Brady v. Ball, 14 Ind. 317.

⁵ Baldwin v. Skillington, 1 W. L. M. 389.

⁶ McAdams v. Sutton, 24 O. S. 333.

Sec. 191. Petition for damages for injury to a person by a dog.—

That on and prior to the — day of —, 18—, the defendant harbored and kept a dog which, as he well knew, was accustomed to attack and bite mankind, which, as he well knew, was of a fierce and dangerous nature to go at large, yet the defendant unlawfully and negligently allowed said dog to go at large without being properly secured.

That on the — day of —, 18—, defendant's said dog attacked, bit and wounded the plaintiff by [*describe the injuries*], by reason whereof the plaintiff became sick and lame, and so continued for the space of — months then next following, and was thereby prevented during all that time from attending to his lawful business, and necessarily expended the sum of — dollars in endeavoring to be cured of said sickness and lameness, to the damage of the plaintiff in the sum of — dollars.

[*Prayer.*]

Sec. 192. Petition for damages for killing dog.—

[*Caption.*]

That on the — day of —, 18—, the defendant unlawfully shot off and discharged a certain gun then and there loaded with gunpowder and shot, at and against a certain dog of the plaintiff, of the value of \$—, and thereby and therewith so greatly wounded said dog that by reason thereof said dog, on the — day of —, 18—, died, to the damage of plaintiff in the sum of \$—, for which he asks judgment.

NOTE.— When a person may not kill a dog, see *Anderson v. Smith*, 7 Ill. App. 354; *State v. Holder*, 81 N. C. 527. Not because he is a nuisance, but because he had bitten some one. *Perry v. Phipps*, 10 Ired. L. 259; *Morse v. Nixon*, 6 Jones' L. 298; *Morris v. Nugent*, 7 C. & P. 572.

Sec. 193. Injury to animals by railroad companies—
Prior to statute as to fencing.— In the absence of any statute or contract requiring railroad companies to fence their tracks, they occupied the same position as did the owners of land, and were not therefore required to fence their track to keep stock from getting thereon;¹ and were therefore only required to use ordinary care and prudence to avoid injury to stock casually coming upon their track.² It was considered lawful for the owner of stock to permit them to run at large, and also for railroad companies to operate their trains upon

¹ *Cranston v. Railroad Co.*, 1 Handy, O. S. 172; 4 O. S. 483; *Railway v. Wood*, 47 O. S. 481.

² *Kerwhaker v. Railroad Co.*, 8

an unfenced railroad track, and that the owners of cattle found on an unfenced railroad track were not, therefore, trespassers. The owner of stock and the railway proprietor each assumed the increased dangers arising from such a rule, and were bound to exercise reasonable and ordinary care to prevent any injury,¹ the paramount duty of those in charge of the trains being the safety of the persons and property in their charge.² Under such rule, in order to make a *prima facie* case against a railroad company, it was necessary to show that the servants in charge of a train were negligent and that an injury was caused by such negligence.³

Sec. 194. Injury to animals by railroads — Under statute as to fencing.— As the state advanced in population, it was found necessary to change the law upon this subject, and relief was furnished by the legislature by the passage of an act⁴ imposing a duty upon railroad companies to inclose their roads by fence, and requiring them to keep the same in repair in the same manner in which partition fences between adjacent owners were required to be kept in repair,⁵ rendering them liable in damages for injuries caused to domestic animals by reason of the want or insufficiency of such fences, corresponding duties having been also imposed upon the owners of animals requiring them to be fenced in.⁶

Changes have been made from time to time, so that the duties and liabilities of railroad companies are now confined largely to statutory provisions upon the subject of fences,⁷ it being unnecessary to here enter into detail. One of the most important changes, however, was the addition to the statute requiring railroad companies to fence their tracks of a provision allowing them to contract with the owners of adjoining farms to construct and keep in repair any portion of the fencing which may inclose the railroad track passing through the farms of such owners.⁸

¹ Railroad Co. v. Watterson, 4 O. S. 433; Central O. R. R. Co. v. Lawrence, 13 O. S. 66 (1861).

² 4 O. S. 474; 3 O. S. 172; 13 O. S. 66.

³ Belfontaine R. R. Co. v. Bailey, 11 O. S. 339 (1860).

⁴ In 1859 (S. & C. 331).

⁵ S. & C. 648 and 649.

⁶ See *ante*, sec. 183.

⁷ R. S., secs. 3324-3333.

⁸ R. S., sec. 2334.

The duties and liabilities of railroad companies have been more clearly defined by the decisions of courts on questions arising under the statute, which may be briefly outlined. It is well settled that the mere fact that the animal has been killed by a train of cars does not give rise to a presumption of negligence on the part of the railroad company, but that the plaintiff must prove affirmatively that it was the want of the use of ordinary care on the part of the company which caused the injury.¹

If an owner of stock, not choosing to avoid danger to them by keeping them on his own inclosure, permits them to run in the vicinity of an uninclosed railroad track, he can require of the railroad company the exercise only of what would be regarded in this peculiar business, of ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road.²

The paramount duty of those in charge of a railroad train is of course the care and safety of the persons and property in their charge; but if the servants of the company, having proper regard to their duties in this respect, can by the exercise of ordinary care see and save horses trespassing upon their tracks, it is their duty to do so.³ This rule, however, seems to have been to a slight degree modified by an unreported case decided by the supreme court, in which it was stated that it was the duty of a railroad company to stop its train, if in its power by the exercise of ordinary care and prudence so to do, without injury to its train, after it discovers the stock upon its track.⁴ This holding would seem to imply that railroad companies are not required to be on the lookout for trespassing stock, but must only endeavor to prevent any injury to them after they may discover them upon their tracks. The rule is followed by a number of

¹ *Railroad Co. v. McMillen*, 37 O. S. 554; *Railroad v. Lawrence*, 13 O. S. 66; *Ruffner v. Railroad Co.*, 34 O. S. 96.

² *Central O. R. R. Co. v. Lawrence*, 13 O. S. 66; *Cincinnati & Z. R. R. Co. v. Smith*, 23 O. S. 227 (1871).

³ *Zanesville, etc. R. R. Co. v. Smith*, 22 O. S. 227 (1877); *Beemis v. Railroad Co.*, 42 Vt. 375; *L. & N. R. R. Co. v. Wainscott*, 3 Bush, 149.

⁴ *Lake Shore & M. S. Ry. Co. v. Slater*, 24 W. L. B. 2. See, also, article in 24 W. L. B. 171.

authorities in other states, but has never been laid down by any official report of the supreme court.¹ Under a more recent holding a railway company is liable to the owner of animals trespassing upon its track without fault upon the part of the owner, if the servants of the company do not exercise ordinary care to avoid injury.*

Under the act of 1859 the duty of railroad companies is not properly discharged by contracting with another party to fence the road, when such party has not constructed or kept the fence in sufficient repair. If the road is properly fenced the company is held only to the exercise of ordinary care in the running of its trains to prevent injury to animals. When improperly fenced a higher degree of care is required;² and where the stock of the land-owner is injured by a train on account of the neglect to keep a fence in repair which he had contracted with the company himself to do, he cannot recover unless he can show that the injury was in fact caused by the negligent running of the train,³ or that it was intentional, or the result of gross carelessness. So far as the railway company is concerned by reason of a failure to build or keep a fence in repair, it is immaterial whether it has entered into a contract with a land-owner to construct or keep the fence in repair, as the contractor is regarded as the agent merely of the company, and it is still liable for its omission as it is for the neglect of any other employee. This is the principle upon which several cases have been decided;⁴ and the rule is the same if a portion of the right of way has been sold to a second company.⁵ Making a contract to build a fence cannot be considered as building one;⁶ and where a person in granting the right of way to a railroad company stipulates and covenants for himself, his heirs and assigns, that he will erect and maintain a fence on each side thereof, a subsequent grantee takes it subject to this covenant as conclusive, and cannot claim any damage from a breach thereof, nor require any higher degree of care upon the part of a railroad company to avoid injury to stock than if the covenant had been kept. A written agreement by a grantor of a right of way to fence on each

¹ *Dennis v. Railroad Co.*, 116 Ind. 42; *Hanna v. Railroad Co.*, 119 Ind. 316; *Palmer v. Railroad Co.*, 37 Minn. 223; 83 N. W. Rep. 707; *Railway Co. v. Rollins*, 5 Kan. 167; *Earnes v. Railroad Co.*, 98 Mass. 563.

² *Gill v. Railroad Co.*, 27 O. S. 240.

³ *Railway v. Heiskell*, 38 O. S. 666

⁴ *Railway Co. v. Wood*, 47 O. S. 431; *Gill v. Railway Co.*, 27 O. S. 240; *Railway Co. v. Allen*, 40 O. S. 206.

⁵ *Railway Co. v. Allen*, *supra*.

⁶ *Gill v. Railway Co.*, *supra*.

* *L. E. & W. R. Co. v. Weisel*, 55 O. S. 155.

side of a railway track will not affect the rights of a subsequent purchaser without notice, actual or constructive, of the existence thereof, so as to prevent him from requiring the railroad company to fence its road in accordance with the statute.¹ Where a railroad fence forms the boundary of an inclosed field it is the duty of both land-owner and railroad company to maintain the fence in proper order; and if a land-owner knowing that a fence is insufficient turns his stock into a field and it is injured by reason of the insufficiency of the fence without any fault on the part of the company in running its train, the land-owner is guilty of contributory negligence which will preclude a recovery by him.² This would be so especially where the fence is not so divided as that either the land-owner or railroad company is charged with the duty of maintaining any particular portion thereof.³

The duty of a railroad company to the stock of a person other than the land-owner immediately adjoining the railroad track, which strays upon the track by reason of the fence at that point not being in sufficient repair, is quite different from that which it owes to the land-owner himself. In such cases the railroad company is only bound to exercise ordinary care, and, in the absence of negligence in the management of its trains, is not liable to the owner of such stock for any injury which may so happen to them.⁴ And where an injury occurs to stock by reason of the neglect of the company to keep the fence in repair as required by statute, it is not relieved from its liability on account thereof, even though the owner of the stock injured pastured them on the land adjacent to the road with full knowledge of the insufficiency of the fence; nor is it necessary that the company should have knowledge of the condition of the fence to make it liable.⁵

An owner of stock is not guilty of contributory negligence precluding recovery of damages by him against a railroad

¹ *Railway Co. v. Bosworth*, 46 O. S. 81; R. S., secs. 3324, 3325.

² *Railroad Co. v. Sloan*, 27 O. S. 341; *Railway Co. v. Infirmary*, 32 O. S. 571.

³ *Railroad Co. v. Infirmary*, 32 O. S. 566.

⁴ *Railway Co. v. Wood*, 47 O. S. 431.

⁵ *Railway Co. v. Smith*, 38 O. S. 410; *Railroad Co. v. Scudder*, 40 O. S. 173; *Rodgers v. Railroad Co.*, 1 Allen, 16; *Railroad Co. v. Schultz*, 43 O. S. 270. See, also, *T. & W. R. R. Co. v. Daniel*, 21 Ind. 258; *C. & A. R. Co. v. Saunders*, 85 Ill. 288; *Davis v. Railroad Co.*, 40 Iowa, 292.

company where the stock, without fault on his part, enter the field of another through which a railroad passes, and on account of a defect in the fence adjoining the track stray upon the track and are thereby injured;¹ but the owner of animals must have used such reasonable care and precaution in restraining them as a prudent and cautious man would ordinarily use, and if they are breachy or unruly, the care must be commensurate with their character.²

Railway companies are bound to fence private ways and roads where they cross their tracks or connect with a public highway, and are liable for injury to stock for their failure to do so when the injury occurs by reason of such neglect.³ And the statute requires that fences shall be constructed and maintained within the limits of villages or cities where they do not obstruct highways and streets. So, if an animal strays upon the track of a railroad company in a village by reason of a failure to fence, the company is liable in damages.⁴ It is not negligence, however, on the part of a railroad company in failing to construct an additional fence between the railroad and lands of an adjacent land-owner who has constructed fences inclosing his own lands in such a manner as to inclose the railroad also; nor will the fact that the right of way was unpaid for prevent the company's joining this fence to the fence constructed by such land-owner so as to inclose its road.⁵ But where the public necessities relieve a railroad company from constructing cattle-guards at crossings, the duty will devolve upon it to place them at the first point at which it will not interfere with such public necessities; and whether they have done so is a question of fact. So, where an injury occurs by reason of its failure to construct cattle-guards at such points, the question as to the liability of the company in damages therefor is one for the jury.⁶

A railroad company, in regulating the speed of its trains, need not regard the increased danger to animals which may

¹ *Railroad Co. v. Stephenson*, 24 O. S. 48 (1878).

² *Railway Co. v. Howard*, 40 O. S. 6.

³ *Railroad Co. v. Cunningham*, 39 O. S. 337.

⁴ See *Cleveland & P. R. R. Co. v. McConell*, 26 O. S. 57.

⁵ *Haxton v. Railway Co.*, 26 O. S. 214.

⁶ *Railroad Co. v. Newbrander*, 40 O. S. 15 (1883).

happen to be running at large in the vicinity of their tracks and for that reason lessen their speed;¹ nor is it liable for damages on account of an injury to stock which may have been caused by the lighting of a head-light early in the evening, thereby interfering with the vision of the engineer and preventing him from seeing cattle upon the track.²

Sec. 195. Petition against railroad company for damages for injuring cattle.—

[*Caption and formal opening.*]

Defendant is a corporation, duly incorporated under the laws of the state of Ohio, and at the time of the grievances hereinafter complained of owned, controlled and managed a certain railroad, with locomotive and cars, in the county of — and state of Ohio.

That on the — day of —, 18—, the said plaintiff was the owner of certain cattle, to wit [*naming them*], of the value of — dollars each [*naming them*], which on the — day of —, 18—, strayed on the track of said defendant railway, and the said defendant so carelessly and negligently ran and managed its locomotive and cars that the same was run against and over said [*naming stock*], thereby killing same, to the damage to said plaintiff in the sum of — dollars.

Wherefore said plaintiff prays judgment, etc.

Sec. 196. Petition for damages where injury occurred by reason of failure of railway company to fence.—

[*Caption and averment of corporate capacity of defendant.*]

That on or about the — day of —, 18—, said defendant was operating a railroad through the county of —, in the state of Ohio; that at said time and at a certain place on its said road where it was required by law to fence its track, said defendant had neglected and failed to [*maintain, or, construct*] a fence sufficient to turn stock [*or, a cattle-guard where the — highway used by the public crosses said railroad company, sufficient to prevent stock from entering upon said railroad*].

That on the said day the plaintiff was the owner of the following horses, to wit: two fine large bay geldings of the value of — dollars each; said horses, at the place where said railroad company was not fenced to turn stock [*or, where said — highway crosses said railroad*], by reason of the failure of the defendant to fence [*or, to construct cattle-guards*], strayed upon the track of said railroad and were run against and killed by a locomotive and cars, managed by the servants

¹ Central O. R. R. Co. v. Lawrence,
13 O. S. 66 (1862).

² B. & L. R. R. Co. v. Schruyhart,
10 O. S. 116 (1859).

of the defendant, to the damage of said plaintiff in the sum of — dollars.

Wherefore plaintiff prays judgment against the said defendant railway company in the sum of — dollars with interest from —.

NOTE—Changed from *Railway Co. v. Hoffhines*, 46 O. S. 643.

Sec. 197. Allegation where injury occurs by reason of insufficiency of fences.—

That the fence was constructed in a careless and negligent manner, and was defective and insufficient to turn stock on or to prevent domestic animals going upon the railroad track; that prior to and at the time of the accident, this fence was, through the negligence of the defendant, in bad repair, and insufficient to turn stock and to prevent domestic animals from going upon the railroad, of which the defendant knew; that by reason of such negligence and the defective condition of such fence, and without the fault of the plaintiff, his horse, on the — day of —, 18—, got across, through, and over the fence to and upon the track, where it was killed by the defendant's cars.

NOTE—From *Railroad Co. v. Schultz*, 43 O. S. 370.

Sec. 198. Petition where company failed to whistle or ring bell — Cattle injured while crossing highway.—

[*Averment of corporate capacity.*]

At the time of the grievances hereinafter complained of, and for a long time prior thereto, the defendant was owning and operating a railroad running from A., in said county, to Y., Ohio, and were running several trains of cars over said road every day.

Said railroad, near the depot at W., in said county, and a short distance north from said depot, crosses a public highway, which is a main traveled road. The plaintiff has for several years owned and occupied land on both sides of said railroad, his house and barns being several rods west of said railroad and his pasture lying east of said railroad and adjoining thereto.

The plaintiff has for several years kept and owned several cows. In driving said cows from said barns to said pasture and from said pasture to said barns it was necessary to drive them across said railroad and along said highway.

On or about the — day of —, 18—, said plaintiff was driving said cows from said pasture to said barns and across said railroad, and in driving them across the said railroad the plaintiff used all necessary care and precaution to save said cows from all and any injury by any train which might be passing over said railroad. The defendant at the

time was running a train of cars over said railroad and across said highway. The agents and employees of the defendant, in charge of said train and who were running the same, did, carelessly and negligently, fail to sound any crossing or other whistle at and for said crossing or to ring any bell as required by statute, and did carelessly and negligently run and manage said train of cars, and failed to stop its said train after discovering said stock upon its track. By reason of said carelessness and negligence, and without any fault of the plaintiff, the engine attached to said train did hit, run into and against two of said cows and killed the same, to the damage of the plaintiff in the sum of one hundred dollars; for which sum he asks judgment against said defendant with interest from —.

NOTE.— Changed from L. S. & M. S. Ry. Co. v. Slater, 24 W. L. R. 2.

Sec. 199. Answer claiming cattle were unlawfully at large.—

The defendant says that plaintiff did not live along the line of said road, nor was his said cow grazing in an unclosed field adjacent thereto; that said plaintiff knowingly, wilfully and unlawfully permitted his said cow to run at large upon the highways and unclosed land adjacent to defendant's said railroad track, whereby said cow went upon said railroad and was accidentally killed; and that by reason thereof plaintiff cannot maintain his said action against said defendant.

NOTE.— From P., F. & C. Ry. Co. v. Methven, 21 O. S. 584.

CHAPTER 16.

ARBITRATION AND AWARD.

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| Sec. 200. Parties to, and what may be submitted to arbitration. | Sec. 209. Form of oath of arbitrators. |
| 201. Agreement to arbitrate. | 210. Award to be in writing. |
| 202. Form of agreement for submission of controversy, with special clauses, and recitals. | 211. Form of award. |
| 203. Bond may be entered into. | 212. Enforcement of award. |
| 204. Form of arbitration bond. | 213. Petition on bond given in a common-law arbitration. |
| 205. Revocation of submission. | 214. Answer of invalidity of award — Common law. |
| 206. Petition against party revoking submission. | 215. Answer setting up award. |
| 207. Process, how obtained. | 216. Award may be set aside. |
| 208. Oath of arbitrators and witnesses. | 217. Objections to award. |
| | 218. Confirmation of an award and judgment thereon. |
| | 219. Entry setting award aside. |

Sec. 200. Parties to, and what may be submitted to arbitration.—Arbitration is the submission of matters of difference between contending parties to the investigation and determination of one or more unofficial persons chosen by them. Persons have a right to settle their own controversies upon any terms they please, and as arbitration is designed for a speedy settlement, embracing within its scope every subject of dispute, except it be the possession and title to real estate, it at once becomes obvious that the law is almost boundless in its capabilities and usefulness. All persons who have any controversy, except when possession of or title to real estate may come in question, may submit such controversies to the arbitration or umpirage of any person or persons, to be mutually agreed upon by the parties, and they may make such submission a rule of any court of record in the state.¹ The parties to a submission must of necessity have full qualifications to contract.² The provisions of the code are broad, and “all per-

¹ O. Code, secs. 5601, 5602.
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² Morse on A. & W., p. 8.

sous" will include corporations,¹ executors and administrators,² guardians,³ county commissioners,⁴ municipal corporations,⁵ contractors, subcontractors or material-men under the mechanics' lien law,⁶ stockholders of railroads in case of sale, lease, or aid by subscription;⁷ and it has been held that an attorney may submit a cause to arbitration on behalf of his client.⁸ It seems that according to the weight of more recent authority, one partner has no implied power, by virtue of the partnership, to bind his copartner by a submission to arbitration.⁹ Where a pending suit is submitted, other matters in controversy may be joined in a general submission between the parties.¹⁰ A question of damages may be submitted and the judgment entered according to the amount found.¹¹ In fact, all matters growing out of contracts as well as liabilities arising from torts committed may be submitted.

Sec. 201. Agreement to arbitrate.—The authority of arbitrators must necessarily be derived from the contract of submission.¹² Where parties undertake to submit a controversy under the statute they should strictly follow its requirements;¹³ yet the statutory arbitration does not take away the common-law right to settle disputed questions in this manner;¹⁴ so that where parties have in some manner failed to comply with the statute rendering it ineffective as a statutory submission, as the omission of the names of the arbitrators,¹⁵ it may nevertheless be held good as a common-law sub-

¹ *Tuscaloosa Bridge v. Jemison*, 33 Ala. 476; *Alexandria Canal Co. v. Swan*, 5 How. 83; *Brady v. Mayor*, 1 Barb. 584.

² *Childs v. Updyke*, 9 O. S. 333; *R. S.*, sec. 6093. *Claims against estate. Bradstreet v. Pross*, 11 W. L. B. 117; *Bennett v. Pierce*, 28 Conn. 315; *Kendall v. Bates*, 35 Me. 357.

³ *Bean v. Farnam*, 6 Pick. 269; *Strong v. Beroujon*, 18 Ala. 168; *Hutchins v. Johnson*, 12 Conn. 376.

⁴ *Jenifer v. County*, 2 Disn. 189.

⁵ *Springfield v. Walker*, 43 O. S. 543.

⁶ *R. S.*, sec. 3200.

⁷ *R. S.*, sec. 3388.

⁸ *Morris v. Grier*, 76 N. C. 410;

Everett v. Charlestown, 12 Allen, 93, 96; *Moye v. Cogdell*, 69 N. C. 93.

⁹ *Tillinghast v. Gilmore*, 17 R. I. 413; 22 Atl. Rep. 942 (1891); *Bates on Part.*, sec. 336, and cases collected in note 4. *Contra, Wilcox v. Singletary*, W. 420; *Morse on A. & W.*, p. 7, and cases cited.

¹⁰ *Jones v. Wellwood*, 71 N. Y. 208.

¹¹ *Conner v. Drake*, 1 O. S. 166.

¹² *Tullis v. Sewell*, 3 O. 510.

¹³ *Moody v. Nelson*, 60 Ill. 229; *Fairchild v. Doleur*, 42 Cal. 125.

¹⁴ *Brown v. Kincaid*, W. 37.

¹⁵ *N. W. Guaranty Loan Co. v. Chan-nell*, 55 N. W. Rep. 121 (Minn., 1893); *W. F. Seminary v. Blair*, 1 Disney, 875. See sec. 205, *post*.

mission and award.¹ No particular form of words is required, but it will be sufficient if there is an agreement to abide by the decision of certain persons upon a particular matter.² To be operative, however, it must be mutual and binding upon both parties.³ A verbal submission between two parties, made simultaneously with or subsequent to a written submission, will be superseded by the latter.⁴ A portion only of the matters involved may be submitted.⁵ A mere agreement to submit certain matters to arbitration does not amount to a submission, nor can it be specifically enforced, but either party may demand that the case be tried in the regular way.⁶ The statute of limitation is defeated in its operation by submission to arbitration,⁷ and it works a continuance of a pending suit.

Sec. 202. Form of agreement for submission of controversy.—

Be it known that A. B., of — county, state of —, and C. D., of — county, state of —, do hereby mutually agree to submit all questions and matters of differences now existing between us [*or any specific question or claim, describing it*] to the arbitration, determination and award of E. F., G. H. and I. J. (or any two of them), as arbitrators to hear and determine the same at —, in —, county of —, state of —, and make their award in writing on or before the — day of —, A. D. 18—, and when so made said award shall be final, binding and conclusive upon us. [And shall be made a rule of the court of common pleas of county, state of —.]

Witness our hands this — day of —, A. D. 18—.

(a) Special clause in agreement.—

Whereas certain differences and disputes have arisen and are still pending between the said parties [*for instance, as to whether the said A. B. is indebted to the said C. D. in any and in what sum of money, and as to the price said C. D. ought to pay for the stock and trade taken by him off the hands of the said A. B.*], it is agreed by and between them that the same shall be referred, etc.

¹ Tyler v. Dyer, 18 Ma. 41; Moore v. Barnett, 17 Ind. 349; Childs v. Updyke, 9 O. S. 833; Estes v. Phillips, 2 C. S. C. R. 8; Strum v. Cunningham, 8 O. 286.

² Willson v. Getty, 57 Pa. St. 266; Kimball v. Walker, 30 Ill. 482.

³ Yeamans v. Yeamans, 99 Mass. 585.

⁴ Loring v. Alden, 8 Met. 576; Symonds v. Mayo, 10 Cush. 39. See

Nashua & L. R. Corp. v. Boston, etc., 157 Mass. 268; 81 N. E. Rep. 1060 (1892).

⁵ Jones v. Wellwood, 71 N. Y. 208.

⁶ King v. Howard, 27 Mo. 21; Conner v. Drake, 1 O. S. 166. Parties cannot by agreement change the mode of procedure of courts. Conner v. Drake, 1 O. S. 166.

⁷ Hunt v. Guilford, 4 O. 310.

(b) Recital of action pending.—

Whereas an action is now pending in the — court of — county, state of —, wherein the said A. B. is the plaintiff and O. D. defendant, it is agreed [*if it is not intended to refer the action but only the subject of the action, add: that all proceedings in the action shall be stayed, but that in order to ascertain, settle and adjust all accounts, claims and amounts in dispute in said action*] that the same [*if the reference is to be general, add: and all matters in difference between the parties*] shall be referred, etc.

(c) Recital of action to be dismissed and matter in dispute referred.—

Whereas the said A. B., on or about the — day of —, A. D. 18—, commenced an action in the — court of — county, state of —, against the said O. D. praying [*here state the substance of the claim*]; and whereas the said parties have agreed that the said action in the said — court shall be dismissed without costs, and that the several matters, questions and differences herein specified, viz., whether [*here enumerate the points to be decided*], shall be referred, etc.

(d) Clause as to costs.—

It is also further agreed that the costs of the reference and award shall abide the event of the award [*or, that the costs of the references and award shall be in the discretion of the arbitrators, who may direct to and by whom and in what manner the same shall be paid*].

Sec. 203. Bond may be entered into.— Parties to a submission may enter into and exchange arbitration bonds for the faithful performance of the award.¹ It should contain the matters agreed to in the submission and the names of the arbitrators,² as well as the time and place for the hearing, and the time within which the award shall be made.³

Sec. 204. Form of arbitration bond.—

Know all men by these presents that we, A. B. and O. D., our heirs, executors or administrators, are made and firmly bound by these presents each to the other in the sum of — dollars. The conditions of the above obligation are such, that whereas the said A. B. and O. D. have agreed in writing to submit all claims and questions between them [*or state the specific matters set out in the agreement for arbitration*] to the arbitration and determination of E. F., G. H. and I. J., the said award to be made in writing under the hands of the

¹ R. S., sec. 5602.

Channell, 55 N. W. Rep. 121 (Minn.,

² W. F. Seminary v. Blair, 1 Den. 1898).370; N. W. Guaranty Loan Co. v. ³ R. S., sec. 5603.

said arbitrators (or any two of them) and ready to be delivered to said parties on or before the — day of —, 18—, and said arbitration to be held at the office of S. M. in the township of —, county of —, state of Ohio, on the — day of —, 18—. The arbitrators having — [and that said submission shall be made an order or rule of the court of common pleas of — county of the state of —]:

Now, therefore, if the said A. B. and C. D., their heirs, executors or administrators, shall well and truly abide by and perform such an award as may be made by said arbitrators, or any two of them, in accordance with said submission, then this obligation shall be void; otherwise to be and remain in full force and effect.

Witness our hands this — day of —, 18—. A. B.

C. D.

NOTE.—R. S., secs. 5600-3.

Sec. 205. Revocation of submission.—An arbitration proceeding at common law was revocable by either party thereto at any time before the award.¹ The rule now adopted is that after the arbitrators have been sworn,² or after notice that an award is made,³ it cannot be revoked. As submissions made under statutes must follow statutory rules, whether or not they may be revoked must depend largely upon the statutes.⁴ Hence it is held that where it has been made a rule of court by virtue of the statutes it cannot be revoked.⁵ The refusal of a person named as arbitrator, or the institution of a suit in reference to the same subject-matter,⁶ or the death of one of the referees, revokes the submission.⁷

No particular form of revocation is required. It must conform to the submission. A written submission requires a written revocation.⁸ It must, however, be express and posi-

¹ *Davis v. Maxwell*, 27 Ga. 368; *Leonard v. House*, 15 Ga. 473; *Marsh v. Packer*, 20 Vt. 198.

² *Commissioners v. Carey*, 1 O. S. 463; *Carey v. Commissioners*, 19 O. 245.

³ *Coon v. Allen*, 156 Mass. 113; 30 N. E. Rep. 83.

⁴ *Montgomery Co. v. Carey*, 1 O. S. 463; *Bloomer v. Sherman*, 5 Paige, 575; *Heath v. President, etc.*, 38 How. Pr. 168. See *ante*, sec. 201.

⁵ *Dexter v. Young*, 40 N. H. 130; *Ferrus v. Munn*, 22 N. J. L. 161; *Haskell v. Whitney*, 12 Mass. 47.

⁶ *Kimball v. Gillan*, 60 N. H. 54.

⁷ *Potter v. Sterrett*, 24 Pa. St. 411; s. c., 39 Am. Dec. 50.

⁸ *Keyes v. Fulton*, 42 Vt. 159; *Shroyer v. Bash*, 57 Ind. 349; *Antwerp v. Stewart*, 8 Johns. (N. Y.) 125; *Wallis v. Carpenter*, 18 Allen (Mass.), 19; *Brown v. Leavitt*, 26 Me. 251.

COLUMBUS, OHIO, Jan. 8, 1894.

To E. F., G. H., I. J., Arbitrators:

Gentlemen—You will take notice that I hereby revoke your powers as arbitrators under the submission made to you by A. B. and myself in

tive and not coupled with conditions.¹ It must be absolute.² It can be made through an agent.³ Notice of the revocation must be given to the arbitrators.⁴ Revocation may be implied by the act of one of the parties.⁵ If one party revokes a submission without consent of the other he becomes liable in damages either upon his arbitration bond or for breach of contract;⁶ but the fact must be shown that the party in some way revoked the submission.⁷ The measure of damages for revocation is the actual damage proved and not the penalty named in the bond,⁸ and may include costs of the discontinued suit and expenses incurred by reason of the submission.⁹

Sec. 206. Petition against party revoking submission.—

[*Caption.*]

On the — day of —, 18—, an agreement in writing duly executed by both plaintiff and defendant, in which it was, amongst other things, agreed by and between them that they would submit the matters in controversy then existing between them, respecting certain money claimed by this plaintiff to be due from said defendant [*or, respecting certain unsettled accounts and matters between them, etc., according to the terms of the agreement*], to the final award and determination of E. F., G. H. and I. J., arbitrators chosen by them (or any two of them), so that said arbitrators should make an award in writing ready to be delivered to the said parties, or such of them as should require the same, on or before the — day of —, 18—; and thereupon, afterwards, to wit, on the — day of —, 18—, the said arbitrators were about to proceed upon the submission as aforesaid made, and the said parties then appeared before the said arbitrators and were about to proceed to trial of the matters so agreed to be submitted to the said arbitrators aforesaid, when said C. D. revoked the said submission by an instrument of revocation in writing duly signed by him and delivered to the arbitrators, whereby the powers of said arbitrators in the premises ceased and were annulled, and whereby also this plaintiff sustained

writing dated the — day of —,
A. D. 18—.

(Signed)

C. D.

¹ Goodwine v. Miller, 82 Ind. 419.
² Steere v. Brownell, 118 Ill. 415.
³ Madison Insurance Co. v. Griffin,
8 Ind. 277.

⁴ Allen v. Watson, 16 Johns. (N. Y.)
205; Brown v. Leavitt, 26 Me. 251.

⁵ Hawley v. Hodge, 7 Vt. 287.

⁶ Call v. Hagar, 69 Me. 521; Dexter
v. Young, 40 N. H. 130; Frets v.
Frets, 1 Cow. (N. Y.) 835; Brown v.
Leavitt, 26 Me. 251.

⁷ Marshall v. Reed, 48 N. H. 88.

⁸ Blaisdell v. Blaisdell, 14 N. H. 78.

⁹ Rowley v. Young, 8 Day (Conn.),
118; Call v. Hagar, 69 Me. 521; Pond
v. Harris, 118 Mass. 114.

great damage, to wit, — dollars, for his costs, expenses and damages in employing and paying counsel, subpoenaing and paying witnesses and in otherwise preparing for the trial of the said cause before the said arbitrators.

Wherefore plaintiff prays judgment against the defendant for — dollars and prays for all other proper relief.

Sec. 207. Process, how obtained.— All parties to arbitration shall have the benefit of legal process to compel the attendance of witnesses, which shall be issued by the clerk of the court of common pleas or any justice of the peace for the county in which the arbitration is held, and shall be returnable before the umpire or arbitrators on the day and place certain therein named.¹ Disobedience to such process is a contempt of court and shall be punished as in other like cases.²

Sec. 208. Oath of arbitrators and witnesses.— The statute requires the umpire or arbitrators, and all witnesses examined, to take an oath to be administered to them by a judge or justice of the peace.³ Where parties have appeared before arbitrators, and entered upon the trial of the case, sworn and examined witnesses, without having an oath administered to the arbitrators or making any objections on that account, they will be deemed to have waived it.⁴ But if an award be made by arbitrators without having the required oath, it will, unless waived, invalidate the award.⁵

Sec. 209. Form of oath of arbitrators.—

In the matter of the arbitration between A. B. and C. D., we, the undersigned arbitrators, appointed by and between A. B. and C. D., do solemnly swear that we will faithfully and

¹ R. S., sec. 5604.

SUBPOENA OF WITNESSES.

State of Ohio, }
— County, } ss.

*The State of Ohio to —, Con-
stable of — County, Greeting:*

You are hereby commanded to
summons X. L. and Z. T. to appear
before E. F., G. H. and I. J., or any
two of them, arbitrators chosen to
determine a controversy between
A. B. and C. D., at —, in — town-
ship, said county and state, on the
— day of —, 18—, at — o'clock
— M., then and there to testify and
give evidence in relation to said con-

troversy before said arbitrators on
the part of said A. B. [or, C. D.]; and
of this writ make due return to me.

Given under my hand this —
day of —, 18—, L. H.

² R. S., sec. 6505.

³ O. Code, sec. 5606. A notary public cannot administer the oath. *State v. Jackson*, 36 O. S. 281.

⁴ *Rice v. Hassenpflug*, 45 O. S. 377; *Flannery v. Sahagian*, 184 N. Y. 85; 81 N. E. Rep. 818; *Bradstreet v. Pross*, 11 W. L. B. 117.

⁵ *Flannery v. Sahagian*, 184 N. Y. 85.

fairly hear and examine the matters in controversy between them and will make a just award according to the best of our understanding.

E. F.
G. H.
L. J.

State of Ohio, }
County of —, } ss.

Subscribed and sworn to before me, a — in the said county and state, this — day of —, 18—.

[Seal.]

L. X.

Sec. 210. Award to be in writing.—The award must be in writing, and signed by the umpire or arbitrators, or a majority, named in the submission.¹ It must be confined to the terms of the agreement, which cannot be changed in any respect or a different one substituted.² But the fact that the arbitrators exceed their authority, or the terms of the submission, does not necessarily invalidate the award. If the void or incompetent portion can be separated from the valid without injustice, this will be done.³ The award must comply with all statutory regulations, and it will be fatal to dispense with them;⁴ and according to some authorities, if it fails so to do, it may stand as a common-law award if such was the intention of the parties,⁵ though to make it a good common-law submission there must be a clear voluntary agreement of submission.⁶ An award must be sufficiently definite so as to be enforced,⁷ and it will be sufficient if it is signed only by a majority of the arbitrators.⁸ The decision of a

¹ O. Code, sec. 5607.

² *Solomons v. McKinstry*, 18 Johns. 27; *Adams v. Adams*, 8 N. H. 82; *Leslie v. Leslie*, 24 Atl. Rep. 319 (N. J. Ch., 1892).

³ *McCall v. McCall*, 36 S. C. 80; 15 S. E. Rep. 348 (1892); *Leslie v. Leslie*, *supra*. See, also, *Palmer v. Van Wyck*, 21 S. W. Rep. 761 (Tenn., 1898). As to boundary line, see *Pearson v. Barringer*, 109 N. C. 898. The powers of arbitrators are derived from the submission and measured by it. *Weaver v. Powell*, 148 Pa. St. 372.

⁴ *Hamilton v. Hamilton*, 27 Ill. 158; *Horton v. Wilde*, 8 Gray, 425; *Fink v. Fink*, 8 Ia. 318.

⁵ *Strum v. Cunningham*, 8 O. 286;

Darling v. Darling, 16 Wis. 644. See *Kreiss v. Hotaling*, 96 Cal. 617.

⁶ *Pierce v. Kirby*, 21 Wis. 124.

⁷ *Thomas v. Molier*, 8 O. 266; *Windisch v. Hilderbrandt*, 5 W. L. B. 415; *Herbst v. Haganaers*, 17 N. Y. S. 58; 62 Hun, 568; 137 N. Y. 290; *Odum v. Railroad Co.*, 10 S. Rep. 222; 94 Ala. 488.

⁸ O. Code, sec. 5607. This is not the universal rule. *Leavitt v. Investment Co.*, 54 Fed. Rep. 439; *Walters v. Pettit*, 19 Pa. Co. Ct. R. 431; *Weaver v. Powell*, 148 Pa. St. 372.

court cannot be treated as an award,¹ although it may be so considered if the court had no jurisdiction.²

Sec. 211. Form of award.—

Be it known that we, the undersigned, E. F., G. H. and I. J., were duly appointed arbitrators as to certain matters in controversy between A. B. and C. D., executed and submitted by them in writing, and on the — day of —, 18—, in pursuance of said submission, we, the said arbitrators, met at —, in the township of —, in — county, state of —, and after being duly qualified, said A. B. and C. D. being present [*or, in person by their attorney, L. M. and N. O., etc.*], we proceeded to hear the proofs and allegations of the said parties and adjourned to meet at the same place on the — day of —, 18—, and at the time and place last mentioned we again met, the parties being present, and after being fully advised in the matter we find [*set out the findings in detail, all matters of dispute referred to*].

We further find that there is no other matter of controversy between the parties [*to be used when there is a reference of all matters in dispute*].

We therefore award to the said A. B., to be paid by the said C. D., the sum of — dollars [*or state the relief the parties are entitled to under the submission and findings*], and the fee of the arbitrators and witnesses and of the justice [*or, judge*] administering oaths, amounting to — dollars, is to be paid by [*here specify party*].

In witness whereof we have hereunto set our hands this — day of —, 18—.

Sec. 212. Enforcement of award.— If either of the parties fail or refuse to comply with an award, the other may file it, together with the submission or arbitration bond, in the court named therein, or, if none is named, then in the court of common pleas.³ And the court shall, if no legal exceptions are made or taken thereto, enter judgment thereon, as upon the verdict of a jury.⁴ If it directs the performance of any act or thing other than the payment of money, a party who disobeys it may be punished as for contempt, as the nature of the case requires.⁵ Any objections to an award should be filed at the term of court to which the submission and award are filed,⁶ and judgment may be rendered thereon at the same term.⁷

¹ Curtis v. Lynch, 19 O. S. 392.

² Bradley v. Sneath, 6 O. 490.

³ O. Code, sec. 5608.

⁴ O. Code, sec. 5609.

⁵ O. Code, sec. 5610.

⁶ Commissioners v. Carey, 1 O. S. 463.

⁷ Gibbon v. Dougherty, 10 O. S. 365.

The right to enforce a common-law award is clear, and the fact that it may be enforced in another mode constitutes no bar.¹ The statutory remedy does not affect this common-law right. A common-law arbitration has no judicial force, and constitutes neither a judgment nor a verdict of a jury. A failure or refusal to perform may, however, create a good cause of action, or constitute a good defense in a suit on the same subject-matter. An independent suit must be brought thereon as in other cases.² In pleading an award the fact of a mutual submission must be averred.³ The submission need not be set out at length, though it must clearly appear that it was valid and binding.⁴ Only so much of the award as is necessary to support the plaintiff's claim need be alleged, and any extrinsic matters necessary to enable the court to ascertain the true object of the submission.⁵

Sec. 213. Petition on bond given in a common-law arbitration.—

[*Caption.*]

Plaintiff states that on the — day of —, 18—, the defendant executed to plaintiff a bond conditioned to abide the award of E. F., G. H. and I. J. upon certain matters in dispute between the plaintiff and defendant C. D. That on the — day of —, 18—, said arbitrators, having previously undertaken said arbitration, duly made and published their award in the matter submitted, whereby they awarded that the defendant C. D. pay the plaintiff — dollars. [*Give substance of award.*] That the said C. D. has failed [and refused] to abide said award, and has failed [and refused] to pay the plaintiff said sum of — dollars as awarded, and the same is now due.

Sec. 214. Answer of invalidity of award—Common law.

[*Caption.*]

The defendant for his answer says that he admits that on or about the — day of —, 18—, the plaintiff and defendant submitted certain matters in controversy between them to the arbitration of E. F., G. H. and I. J., who were to notify the parties of the time and place at which they would receive the testimony of said parties or their witnesses, and therefore on or before the — day of —, 18—, filed their award. That said arbitrators did not notify the defendant

¹Swasey v. Laycock, 1 Handy, 884.

⁴Morse on Arb. & A., pp. 584-5.

²Childs v. Updyke, 9 O. S. 838;

⁵Morse on A. & W., pp. 586-7;

Males v. Lowenstein, 10 O. S. 512.

Blanchard v. Murray, 15 Vt. 548.

³Tullis v. Sewell, 8 O. 510-13.

of the time and place where they would meet to hear the matters submitted, nor did this defendant have an opportunity to be heard in his defense before them; that the defendant is informed that on or about the — day of —, 18—, said arbitrators met at —, and in the presence of the plaintiff examined several witnesses in regard to the matter submitted to them, and thereafter filed the alleged award, but the defendant had no opportunity to be heard and said proceedings were heard without his knowledge or consent; that the defendant at the time of the submission to said arbitrators had and now has a good defense to the matter so submitted, and if an opportunity had been given him to produce his witnesses he would have been entitled to an award in his favor.

NOTE.— See *Brasill v. Isham*, 12 N. Y. 9.

Sec. 215. Answer setting up award — Statutory.—

[*Caption.*]

Defendant for his answer says that after the making of the said several promises in the said complaint mentioned, and before the commencement of this action, and on the — day of —, 18—, said plaintiff and the said defendant submitted themselves as required by law by an instrument in writing duly acknowledged, and thereby all things well and truly to keep, obey and perform the award, arbitrament and final determination of E. F., G. H. and I. J., arbitrators individually elected and named as well on the part and behalf of the plaintiff as of the defendant, to arbitrate, award and determine all manner of action and actions, cause and causes of action, and of all controversies and matters whatsoever at any time heretofore had, made, committed or depending by and between said parties or either of them, so that the said award should be made by the said arbitrators under their hands and ready to be delivered to the parties in difference, or such of them as should desire the same, on or before the — day of —, then next. [*Or insert a copy of the instrument, or describe the particular matter submitted.*]

Sec. 216. Award may be set aside.— If legal defects appear in an award or other proceedings, or if it be made to appear on oath at the term of the court at which the award and arbitration bond are filed, that the award was obtained by fraud, corruption or other undue means, or that the arbitrators or umpire misbehaved, the court may set aside the award, and the matters submitted shall be retained by the court for trial as upon appeal. The court shall direct who shall be plaintiff and who shall be defendant in the action, and such proceedings shall thereafter be had therein, and such

pleadings filed as in a civil action; and the court may make such order as to costs in the premises, or such other order on the award, as it deems just and right.¹ An award may also be set aside by agreement of parties.² It will be presumed that the arbitrators have acted within their authority, and the burden is therefore upon the complainant.³ An award may be set aside where one of the arbitrators was biased or interested,⁴ or is related to one of the parties;⁵ but an objection based upon relationship should be made before the award, if known.⁶ It may also be set aside upon equitable grounds, or for uncertainty,⁷ or for error of law appearing upon its face.⁸ Where it is sought to set an award aside on the ground of fraud, following the well-known principle of pleading fraud, the facts constituting the same must be fully set forth.⁹ It cannot be set aside because of a mistake, as the remedy in such cases is by appeal or error.¹⁰ If an award, though not a good statutory one, yet is a valid common-law award, the court should deny a motion to set it aside.¹¹

An award void in part and good in part may be upheld unless the objectionable part is so dependent upon that which is unobjectionable as to be inseparable therefrom.¹² In order that a part of an award may stand, and that which is bad be rejected, that portion which is bad must be so independent that it may be rejected without in any way affecting that which is good, and will not in any wise work injustice to any of the parties by rejecting it; otherwise the whole award

¹ R. S., sec. 5611.

² *Rogers v. Weaver*, W. 174.

³ *Solomon v. McKinstrey*, 18 John. 27.

⁴ *W. F. Seminary v. Blair*, 1 Disn. 370. See *Hart v. Kennedy*, 47 N. J. Eq. 51; 20 Atl. Rep. 20.

⁵ *Davis v. Forshee*, 84 Ala. 107.

⁶ *Robb v. Brauchman*, 38 O. S. 423; *Pearson v. Barringer*, 109 N. C. 398.

⁷ *Brymer v. Clark*, 20 O. S. 231; *Thomas v. Molier*, 3 O. 266.

⁸ *Swasey v. Laycock*, 1 Handy, 384. Arbitrators have the power to decide upon both the law and the facts. *Crabtree v. Green*, 8 Ga. 8; *Memphis*,

etc. *R. R. Co. v. Scruggs*, 50 Miss. 285; *Mickle v. Thayer*, 14 Allen, 114; *Mitchell v. De Schaamps*, 18 Rich. 9; *Conrad v. Johnson*, 20 Ind. 421.

⁹ *Bowden v. Crow*, 21 S. W. Rep. 612 (Tex., 1898). As to fraud, see *Ormsby v. Bakewell*, 7 O. (1st Pt.) 99.

¹⁰ *Appeal of Morgan*, 110 Pa. St. 271.

¹¹ *Kreiss v. Hotaling*, 96 Cal. 617; *Fink v. Fink*, 8 Iowa, 313.

¹² *Banks v. Adams*, 28 Me. 259; *Par-malle v. Allen*, 32 Conn. 175; *Walker v. Walker*, 28 Ga. 140; *Chase v. Strain*, 15 N. H. 535; *Carson v. Earlywine*, 14 Ind. 256.

must fall.¹ If an unlawful act be required to be performed by either of the parties, or one which is uncertain or impossible, the award will be void.² Where several matters are awarded, and the award is entire and yet in its nature indivisible, it is void *in toto*.³

Sec. 217. Objections to award.—

In the matter of the arbitration between A. B. and C. D., C. D., one of the parties to the award in the above-entitled proceedings, in compliance with the rule of the court, heretofore entered objections to the confirmation of said award and the rendition of the judgment thereon, for the following reasons:

1st. That the submission to the said arbitrators was obtained by fraud in this [*state particularly acts of fraud relied upon*].

2d. That said award was obtained by fraud, [corruption, partiality in the arbitrators, E. F., G. H., I. J., or any one of them] in this [*state the facts*].

3d. That said arbitrators, E. F., G. H. and I. J., were guilty of misconduct [*state the cause particularly, as, refusing to postpone a hearing to a later date upon sufficient ground shown, or refusing to hear pertinent evidence to the controversy, or any other cause*], by which his rights were materially prejudiced.

6th. That said arbitrators, E. F., G. H. and I. J., exceeded their powers under said submission in this [*state the facts relied upon*].

7th. That said arbitrators, E. F., G. H. and I. J., so imperfectly executed their powers that a mutual, final and definite award on the subject-matter was not made [*state the facts to show this allegation*].

C. D.

Sec. 218. Confirmation of award and judgment thereon.

[*Title.*]

Now comes A. B., the above-named party, by his attorney, J. T., and comes also C. D., the above-named party, by T. U., his attorney, and the said C. D., in the discharge of the rule to show cause why the award should not be confirmed and judgment rendered thereon, files his objections to said award as follows [*here insert objections*], which objections are submitted to the court for a hearing. And the court, having heard the evidence and argument of counsel, overrules the

¹ Philbrick v. Preble, 18 Ma. 255; Chase v. Strain, 15 N. H. 585; Gibson v. Powell, 5 Sm. & M. 712-723; Darling v. Darling, 16 Wis. 644; Rixford v. Nye, 20 Vt. 183.

² Aubert v. Maze, 2 B. & P. 371; Simmonds v. Swain, 1 Taunt. 549.

³ Cook v. Carpenter, 84 Vt. 121; Black v. Hickey, 48 Ma. 545; Hazen v. Addis, 14 N. J. Law, 333.

same, to which the said C. D. excepts. It is therefore adjudged and decreed that the said award be and the same is hereby in all things confirmed and the court renders judgment thereon. It is therefore considered and adjudged that A. B. recover of and from C. D. the sum of — dollars and — cents, as awarded by said arbitrators, and that said A. B. recover from C. D. the cost of this proceeding in this court, taxed at — dollars and — cents. [And that said C. D. pay the sum of — dollars and — cents accrued for the fees and expenses of the arbitration.]

Sec. 219. Entry setting award aside.—

[*Title.*]

Comes now A. B., by his attorney, J. T., and comes also C. D., by his attorney, T. U., and files his objections to the compromise of the award rendered by E. F., G. H. and I. J., dated the — day of —, 18—, as ruled by this court, which objections are as follows: [*Here insert objections.*]

The court, after hearing the evidence and argument of counsel, finds for said C. D., that said objections are proved and sustained and that the same are true. It is therefore hereby ordered, adjudged and decreed that said award be and the same is hereby found, declared void and set aside, to which ruling the said A. B. excepts. It is also adjudged that said C. D. recover of and from A. B. the costs of this proceeding in court, taxed at — dollars and — cents. [And also all the costs of arbitration, taxed at — dollars and — cents.]

CHAPTER 17.

ASSAULT AND BATTERY—CIVIL ACTION IN DAMAGES.

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| <p>Sec. 220. Will lie when.</p> <p>221. The petition.</p> <p>222. General form of petition for assault and battery.</p> <p>223. Petition for assault upon servant, son or daughter.</p> <p>224. Petition by female for assault with intent to have unlawful intercourse.</p> <p>225. Petition by an infant by next friend.</p> <p>226. Petition by husband for assault upon his wife.</p> <p>227. Answer—General denial.</p> <p>228. Answer pleading self-defense.</p> <p>229. Answer denying assault with intent to have unlawful intercourse.</p> | <p>Sec. 230. Liability of railway companies for wilful and malicious conduct of and assaults by its servants upon passengers.</p> <p>231. Same continued—Adjudications of courts.</p> <p>232. Petition for wrongful removal of passenger from street-car.</p> <p>233. Petition for ejection from railroad car and for assault.</p> <p>234. Answer of railway company that plaintiff was ejected for non-payment of fare.</p> |
|---|--|

Sec. 220. Will lie when.—Whenever there is ground for a criminal proceeding for an assault and battery, the party injured may also prosecute a civil action in damages for any injury which he may sustain. In each proceeding, criminal or civil, the plea of self-defense is the same; but if the defendant was the aggressor, he of course cannot invoke the doctrine of self-defense; and the party who repels the aggressor must only use such force as the necessities of the case may require and must not inflict excessive injuries on his assailant.¹ The danger apprehended by the party assailed must, however, be manifest and apparent, and there must be no other means of protection available in order to justify an assault.² Instigators,

¹Thompson v. Gray, 83 Ala. 291;
3 S. Rep. 88 (1887); People v. Will-

²Keyes v. Devlin, 3 E. D. Smith,
518. He may act on appearance.
Jamison v. Mosley, 69 Miss. 478.

advisers of an assault, an abettor, or all who participate therein, are liable for damages occasioned thereby even though they are not present.¹

Where a person has come into the possession of property he may use such force as may seem to him necessary to prevent another from entering or interfering with the same,² and the owner of a house may be justified in using the necessary force to defend his possession.³ One who disturbs a religious meeting and interrupts its order and decorum may be removed therefrom by the use of such force as may be necessary; and it is not essential that the disturbance be wilful.⁴

An action for damages for assault and battery is not barred even though the parties have fought by agreement; but such a fact may be shown in mitigation of damages, and this, too, under a general denial,⁵ and the agreement may be inferred from the conduct of the parties;⁶ and the rights of each combatant to damages may, under the code, be determined and measured in the same action.⁷ It is upon the same principle of public policy that one who is the first assailant in a fight may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such cases — the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defense.⁸ It has been held that a dealer in merchandise on the instalment plan is responsible in damages for an assault and battery committed

¹ Bell v. Miller, 5 O. 250; Willi v. Thompson, 59 Wis. 540; Commonwealth v. Collberg, 119 Mass. 350. The fact that it was voluntary may be shown to keep down punitive damages. Grotton v. Glidden, 84 Me. 589; 24 Atl. Rep. 1008. See, also, White v. Barnes, 112 N. C. 323; 1 S. E. Rep. 922.

² Bliss v. Johnson, 73 N. Y. 529.

³ Corey v. People, 45 Barb. 262.

⁴ Wall v. Lee, 84 N. Y. 141.

⁵ Barholt v. Wright, 45 O. S. 177; 2 Greenl. Ev., sec. 85; Logan v. Austin, 1 Stewart, 476; Bell v. Hausley, 8 Jones (N. C.), 181; Adams v. Waggoner, 33 Ind. 531; Shay v. 181, and cases cited.

⁶ State v. Foy, Tapp. 71.

⁷ Swan's P. & P. 259, note a.

⁸ Barholt v. Wright, 45 O. S. 177-

by a servant in gaining possession, though in violation of instructions.¹

Sec. 221. The petition.—An injury by assault and battery being one to the person is therefore civil, and though committed at the same time by the same person upon more than one, each person who has suffered injury must bring a separate action.² And the petition must state only the facts which constitute the cause of action. The fact that the act which causes the injury is of itself unlawful, or the motive or intent of the wrong-doer so far as an action for damages is concerned, is immaterial. And so in an action for damages for an assault and battery, it is not necessary to aver any malice on the part of the defendant, but only the facts from which it may be inferred, as such evidence may be admitted under an allegation that the assault was made without provocation and with great force and violence, as tending to show the character of the conduct and exhibit and explain the motive of the defendant to enable the jury to determine the question of exemplary damages.³

Where a petition alleges that the defendant maliciously assaulted plaintiff with a dangerous knife, cut, beat and wounded him, with intent to kill and murder, and contains a prayer for general damages, evidence of all facts showing damages, such as is paramount to health, which naturally results from the act complained of, may be admitted thereunder, and it is not necessary in such case to aver any special matters which may be the legal and natural consequences of a tortious act; for under a general prayer all acts and circumstances giving character to the assault may be shown, and all damages which naturally flow from the unlawful act may be recovered.⁴

Doctor bills, although paid by a third person, can not be recovered as resulting damages, but must be specially

¹ *McClung v. Dearborne*, 134 Pa. N. Y. 440. See *Shea v. Railway Co.*, 62 N. Y. 160.

² *Bliss on Code Pldg.*, sec. 26.

³ *Klein v. Thompson*, 19 O. S. 569, *Barzezinaki v. Tierney*, 60 Conn. 55; *Roberts v. Masons*, 10 O. S. 277; *572 (1869)*; *Hilbert v. Doebricke*, 8 W. L. B. 268; *Elfers v. Wooley*, 116 Quimby v. Smith, 31 O. S. 529.

N. Y. 294; *Boltz v. Blackmar*, 61

averred.¹ It is not necessary to allege that the beating was unlawful;² but in order that a defendant may avail himself of the defense that the assault was committed by way of self-defense, he must specially plead the same.³ He cannot, however, claim the benefit of the doctrine of contributory negligence, as that has no application whatever to an action of this character.⁴ It is not necessary, therefore, to allege that the plaintiff was without fault.⁵ The plaintiff in an action for damages for an assault and battery may have an order of attachment issued and levied upon the defendant's property, but the affidavit must show that the obligation was a criminal one.⁶

Sec. 222. General form of petition for assault and battery.—

[*Caption.*]

That the said defendant, heretofore and on the — day of —, 18—, at — [with force and arms], made an assault on the plaintiff, and then and there beat, bruised, wounded and ill-treated him, to the damage of the plaintiff of — dollars, for which sum plaintiff asks judgment.

Sec. 223. Petition for assault upon servant, son or daughter.—

[*Caption.*]

Plaintiff alleges that one C. D. was on the — day of —, 18—, and still is, in his employ as a servant. That defendant on said date did unlawfully make an assault upon his said servant C. D., and did beat, wound and injure him, by reason whereof said C. D. became sick, and has been unable for — months to perform any work, plaintiff being thereby deprived of his services during said period, and has thereby sustained damages in the sum of \$—, for which sum he asks judgment against said defendant.

Sec. 224. Petition by female for assault with intent to have unlawful intercourse.—

The said plaintiff for cause of action says that on or about the — day of —, 18—, at or near —, in said county,

¹ Klein v. Thompson, 19 O. S. 569. meltz v. Kelley, 72 Ind. 442; Whitehead v. Hathaway, 85 Ind. 85. See O'Leary v. Rowland, 81 Mo. 117.

² Schlosser v. Griffith, 125 Ind. 431; s. c., 25 N. E. Rep. 459. ³ Myers v. Myers, 3 Ind. App. 236.

⁴ Myers v. Moore, 8 Ind. App. 236. (1856); Sturdevant v. Tuttle, 21 O. S. 111.

⁵ Ruter v. Fay, 46 Ia. 183; Sten-

⁶ Creasser v. Young, 31 O. S. 57.

the said defendant, — —, unlawfully assaulted and beat the said plaintiff, with intent then and there to have unlawful intercourse with her against her will, to the damage of plaintiff in the sum of — dollars.

Wherefore plaintiff asks judgment against said defendant in the sum of — dollars.

NOTE.—A very general statement of the facts of assault and injury is good as against a general demurrer. *Bormuth v. Beyer*, 10 O. C. C. 291.

Sec. 225. Petition by an infant by next friend.—

[*Caption.*]

Now comes — —, an infant, by his next friend, — —, and for a cause of action says that on or about the — day of —, 18—, at —, the defendant, — —, assaulted and beat the plaintiff, — —, to his damage in the sum of — dollars, for which he asks damages.

NOTE.—From *Banks v. Thompson*, unreported case, No. 1745.

Sec. 226. Petition by husband for assault upon his wife.

[*Caption.*]

Plaintiff alleges that he was married to C. D. on the — day of —, 18—, with whom he has since been and is now cohabiting as his wife. That the defendant did on the — day of —, 18—, unlawfully assault his said wife C. D., and did beat, wound and injure her, thereby causing her to become sick and unable to perform her accustomed household duties for —, whereby plaintiff was deprived of her said services, and has sustained damages in the sum of \$—, for which he asks judgment against defendant.

NOTE.—If husband has sustained any special damages they should be pleaded. *Uertz v. Singer Mfg. Co.*, 35 Hun, 116. See chapter on Husband and Wife.

Sec. 227. Answer — General denial.—

[*Caption.*]

Now comes the said defendant, — —, and for answer to the plaintiff's petition filed herein says that he denies each and every allegation contained therein.

NOTE.—Under the plea of "not guilty" the defendant may introduce evidence of mitigating circumstances to reduce the damages. *Jamison v. Moseley*, 69 Miss. 484 (1891).

Sec. 228. Answer pleading self-defense.—

Defendant says that at the time mentioned in plaintiff's petition, and just before the assault therein complained of, the said plaintiff made an assault upon the defendant, and that the defendant, in defending himself against the said assault so made upon him by said plaintiff, necessarily and unavoidably beat and bruised said plaintiff, but only so far as was necessary to repel the assault so made upon defendant.

NOTE.—Self-defense must be specially pleaded. *Myers v. Moore*, 28 N. E. Sep. 724; 3 Ind. App. 226. A defendant may be justified in acting on ap-

pearances. *Jamison v. Moseley*, 69 Miss. 478. Abusive words will not justify an assault. *Wiley v. Carpenter*, 64 Vt. 212; 23 Atl. Rep. 630; *Tatnall v. Courtney*, 6 Houst. (Del.) 484.

Sec. 229. Answer denying assault with intent to have unlawful intercourse.—

Now comes the said defendant G. W. H., and for answer to the petition of the said ———, plaintiff, filed herein, denies that at the time and place stated in the petition, or at any other time or place, he unlawfully assaulted the said plaintiff with the intent to have unlawful sexual intercourse with her against her will. And he denies that he ever had any intent or desire, unlawfully or otherwise, to have sexual intercourse with said plaintiff against her will or otherwise. And he denies each and every, all and singular, the allegations of the petition.

Sec. 230. Liability of railway companies for wilful and malicious conduct of and assaults by its servants upon passengers.— There is a class of cases arising from the wilful and malicious conduct of the servants of railway companies, and assaults committed by them upon passengers, which may properly fall and be treated in this chapter, being in the nature of actions for the recovery of damages arising by reason of assaults of the servants of such company. According to some text-writers, and judging from the manner in which they have arrayed the authorities on this subject, there would seem to be some conflict of authority upon the question of liability of the company for assaults committed by its servants. In one instance, a case in Ohio, and others in New York are classed as being against the doctrine that there is any liability on the part of the companies for assaults so committed by their servants, upon the theory that such acts, being wilful, malicious and criminal, are on that account not committed while acting within the scope of authority of the company. The difficulty, however, arises by confusing the principles which govern the general subject of master and servant with those which control the relations between railway companies and their servants, as well as in the application of the doctrine of the liability of the master for the acts of his servants while acting within the scope of authority, to particular cases. It is quite impossible that a decision of one case can always operate as a general rule applicable to others. There are also other considerations

to be weighed in defining duties of railway companies to their passengers, and their liability for the acts of their servants toward passengers, in contrast to the duties and liabilities of masters and servants in other lines of service. It is a universal rule that carriers of passengers are liable for unlawful and wilful acts of their servants acting within the scope of their authority, and especially within their instructions and in the performance of a duty prescribed.¹

It is equally well-settled law that railway companies must protect their passengers from violence, insult and injury from whatever source arising.² This rule, however, is subject to the qualification that companies cannot be charged for injuries which could not have been prevented by their servants,³ or those arising from an unexpected assault by another passenger which was promptly interfered with by the conductor.⁴

It being the duty of railway companies to exercise the highest degree of care towards their passengers, they are especially required to prevent an unlawful assault from being made by their servants. It is said, however, that the rule which governs the relations between master and servant generally, namely, that no liability is imposed upon the master for an unlawful and wilful assault made by his servant when not acting within the scope of his employment, has no application whatever to the relation of carriers of passengers;⁵ that the railway company enters into a contract with its passenger to carry him safely, and to protect him from any ill treatment or violence by its servant or third person, and is therefore liable in damages for an assault and battery

¹ *Rounds v. Railroad Co.*, 64 N. Y. 129; *Railroad Co. v. Dunn*, 19 O. S. 162; *Passenger Ry. Co. v. Young*, 21 O. S. 518; *Pittsburgh, etc. Ry. Co. v. Slusser*, 19 O. S. 157; *McKinley v. Railroad Co.*, 24 Am. Rep. 748; *Moore v. Railroad Co.*, 64 Am. Dec. 88; *Craker v. Railway Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Chicago, etc. R. R. Co. v. Flexman*, 108 Ill. 546; *Schultz v. Railroad Co.*, 89 N. Y. 247, and cases cited; *Jackman v. Railroad Co.*, 7 Am. Rep. 448.

² *Goddard v. Railroad Co.*, 2 Am. Rep. 89; *Pittsburgh, etc. R. R. Co. v. Heines*, 53 Pa. St. 512; *Flint v. Transportation Co.*, 34 Conn. 554.

³ *Randall v. Railway Co.*, 189 Pa. St. 464.

⁴ *Mullen v. Railroad Co.*, 46 Minn. 474; 49 N. W. Rep. 249 (1891).

⁵ *Stewart v. Railroad Co.*, 90 N. Y. 588; *Carpenter v. Railroad Co.*, 97 N. Y. 500; *Evansville, etc. Ry. Co. v. McKee*, 99 Ind. 521; *Steamboat Co. v. Brockett*, 121 U. S. 645.

committed by one of its servants upon a passenger, whether it arises from negligence or wilful and malicious conduct.¹

Sec. 231. Same continued — Adjudications of courts.— A railway company may make rules governing the management and control of its train, and prescribing the duties of its servants with reference thereto, which will not be interfered with unless unreasonable. For example, it may make a rule requiring a conductor to eject from his train a passenger who refuses to produce a ticket or pay his fare on demand.² Upon these rules the liability of the company for assault committed by its servants in many cases hinges. The master is responsible for all acts of his servant done in the course of his employment under express or implied authority, and the moment he steps beyond that line the servant is as much a stranger to his master as any third person; but he is invested with authority to use the necessary means to the performance of the duties assigned him, the character of which will vary according to the nature of the duty to be performed and attending circumstances.³ The conductor of a railway train, however, in admitting or excluding passengers from cars, or in assigning them to places after they have entered, acts within the scope of his employment, and the company is civilly responsible, even though they may be of positive malfeasance or misconduct,⁴ and is liable for a wrongful ejection of a passenger by a third person under direction of the conductor.⁵ So, if a driver of a street-car, having authority to collect fare and to put a person off for the non-payment thereof, ejects a passenger, the company will be liable for any injury which may result from excessive force in so doing, or if put off while the car is in motion.⁶ Even though a passenger's ticket has been wrongfully

¹ *Passenger Ry. Co. v. Young*, 21 O. S. 518; *Goddard v. Railroad Co.*, 57 Ma. 202; s. c., 2 Am. Rep. 200; *Weed v. Railroad Co.*, 17 N. Y. 362; s. c., 72 Am. Dec. 474. Female passengers are entitled to be protected from rude, indecent or brutal behavior. *Keene v. Lizardi*, 26 Am. Dec. 478.

² *Crawford v. Railroad Co.*, 26 O. S. 580; *Shelton v. Railroad Co.*, 29 O. S. 219; *Townsend v. Railroad Co.*, 56 N. Y. 296.

³ *Railroad Co. v. Wetmore*, 19 O. S. 181, 182.

⁴ *Passenger R. R. Co. v. Young*, 21 O. S. 524; *Railroad Co. v. Wetmore*, *supra*; *Limpus v. Omnibus Co.*, 1 H. & C. 541.

⁵ *Railroad Co. v. Young*, 21 O. S. 518.

⁶ *Healy v. Railroad Co.*, 24 O. S. 28. See *State v. Kimber*, 4 W. L. G. 859.

taken up by a conductor, he must still provide himself with another or pay his fare; if he refuses and is ejected, his remedy is not for expulsion but for the wrongful taking up of the ticket.¹ So a person boarding a crowded passenger train, even though unable to procure a seat, must nevertheless give the conductor his ticket or pay his fare; if he fails to do so he may be ejected. If the conductor attempts to take the ticket by force he is guilty of assault and battery, for which the company is liable.² Such a passenger must not be ejected with unreasonable violence, or at a place where he would be exposed to serious injury or danger.³ Nor is a passenger who has lost a commutation ticket justified in refusing to pay his fare, and if ejected cannot maintain an action of tort against the railroad company in the absence of excessive force on the part of the company's servants.⁴ A conductor is not justified in using any more force in ejecting a boisterous or unruly passenger than any other, but must reasonably exercise the right, avoiding unnecessary injury.⁵ The force used by a conductor in the removal of a passenger must in all cases be consistent with the safety of the passenger's life.⁶

A regulation by a street railway company requiring a passenger who takes into a car a package too large to be carried on his lap to pay an additional fare therefor is a reasonable one, and the conductor is justified in using the requisite force to remove such a passenger, and if he uses no more than is necessary to eject him the company cannot be held liable for assault;⁷ but a company is liable for an assault and battery committed by a conductor who forcibly takes property from a passenger for payment of fare;⁸ or for an assault and battery committed by a ticket agent upon a person purchasing a

¹ *Shelton v. Railroad Co.*, 22 O. S. 219. ⁴ *Harrold v. Railroad Co.*, 47 Minn. 17.

² *C. C. C. & I. Ry. v. McLean*, 1 O. C. C. 117.

⁶ *Sandford v. Railroad Co.*, 28 N. Y. 343; *Klein v. Railroad Co.*, 39 Cal. 587.

³ *Railroad Co. v. Skillman*, 39 O. S. 453; *Cory v. Railroad Co.*, 8 W. L. G. 90.

⁷ *Morris v. Atl. Ave. R. R. Co.*, 116 N. Y. 552.

⁴ *Crawford v. Railroad Co.*, 26 O. S. 580.

⁸ *Ramsden v. Railroad Co.*, 6 Am. Rep. 200.

⁵ *Railroad Co. v. Valleley*, 32 O. S.

ticket, caused by an altercation about it;¹ or for an assault by a conductor upon a passenger who refuses to pay fare a second time, the conductor claiming that it had not been paid.²

Cases may arise where the conduct of a passenger will be such that his right to recover damages for an assault may be waived by his own misconduct, as the duty is devolved upon the party complaining to so demean himself toward the servant as not, by misbehavior, to provoke a quarrel between them.³ So it has been held that where a person who has purchased a ticket as a passenger applies to a servant of a railway company to have his baggage checked, who by his impudent conduct and abusive language toward the plaintiff provoked a quarrel in which the servant, to gratify his personal resentment, struck the plaintiff, he cannot recover damages therefor.⁴

Sec. 232. Petition for wrongful removal of passenger from street-car.—

Plaintiff says that the defendant is a corporation duly incorporated under the laws of Ohio; that it is a common carrier of passengers; that it has a street railroad track on — street, in the city of —, between — and — streets in said city; that it has street railroad cars running on its said track for the carrying of passengers therein; that it has one of its cars, number —; that it has in its employ on this car a conductor, and that all of these statements were equally true of and applicable to defendant on the — day of —, 18—; that on the night of the — day of —, 18—, plaintiff boarded said car number —, at the corner of — and — streets, the car, at his request, having stopped to let him get on; that he thus boarded said car to ride therein as a passenger a few squares; that he had in his hand, and was ready to pay when called upon, the charge for his transportation, but that he was not called upon to pay anything; that after he was upon the car, the conductor thereof, appointed by and in the employ of defendant, ordered him to go to the front of the car near the driver, and to stand on the platform in front of the car; that plaintiff refused to obey this order and took a seat within the car, claiming at the time that he had a right so to do; that the said conductor then, in a rude manner, or-

¹ Fick v. Railroad Co., 60 Am. Rep. 414; Flinn v. Railroad Co., 49 N. Y. 873. Super. Ct. 81; Harrison v. Fink, 42

² Goddard v. Railroad Co., 2 Am. Fed. Rep. 787.

Rep. 89.

⁴ Little Miami R. R. Co. v. Wet-

³ Scott v. Railroad Co., 58 Hun, more, 19 O. S. 110.

dered plaintiff to get out of the car, which he declined to do; and thereupon the said conductor called to the driver to come and assist him (the conductor) to put plaintiff off the car, but the driver did not come; then the conductor ordered the car to move on; that, as the car passed — street, the conductor stopped it and stated to plaintiff that he would go and get a policeman and would put him (plaintiff) out of the car, to which plaintiff replied that he would obey the order of an officer; that the conductor returned to the car without a policeman, and ordered it to move on; that when the car reached — street the conductor stopped it and procured some rowdies, who, at the instigation and by the procurement of the conductor, entered the car and with force and violence assaulted plaintiff, seized him by the throat, dragged him from the car and struck him, wounding and cutting his face. Plaintiff says that this was done by the procurement and direction of the said conductor, he being present, using and assisting the said rowdies, and he being, at the same time, in the employ of the defendant as their conductor, and as such having control of the car; that plaintiff was thus by the defendant, through its conductor, assaulted, beaten and driven from the car as aforesaid. Plaintiff further says that during all this assault upon him, and during the time he was in the car, he was in an orderly and proper manner conducting himself, being seated upon the seat of the car; that the car was not full, but that there was abundant room for many such passengers. Plaintiff therefore says he has been injured and damaged by the defendant by the above acts to the amount of — dollars, for which sum he asks judgment.

NOTE.—From *Passenger Railroad Co. v. Young*, 21 O. S. 518. This petition sustained the attack of a demurrer.

Sec. 233. Petition for ejection from railroad car and for assault.—

That on the — day of —, 18—, the defendant was a corporation doing business within the state of Ohio, and was the owner and proprietor of a certain railroad line running from —, in the county of —, to —, in the state of —, and was then and there, at the date aforesaid, and for a long time prior thereto had been and still is, a common carrier for hire of passengers and their baggage over its line of railway. That at that date, at —, he purchased of the defendant a passage on its train of cars from — to —, and paid therefor the usual fare to defendant's agent, and boarded defendant's car at —, about — o'clock in the evening of the — day of —, 18—, and rode on the train, as he was entitled, to —, till he reached a point near the city of —, in the county of —, Ohio, where the defendant's agent and conductor of the train, in the course of his collections of fares

on the train, took from the plaintiff the ticket which he received from —, the defendant's agent, as the token of his right to a passage to —, and thereafter when the train had reached a point about — miles west of —, the conductor of the train stopped it, and in an uninhabited part of the —, about the hour of midnight, and refused to carry the plaintiff or permit him to ride any farther on the train towards —, and without any just cause illegally and violently assaulted the plaintiff and put him off the train, and left him to take his way as best he might to —.

Wherefore plaintiff was damaged in the sum of — dollars, for which he asks judgment.

NOTE.—From *A. & G. W. Ry. Co. v. Dunn*, 19 O. S. 162.

Sec. 234. Answer of railway company that plaintiff was ejected for non-payment of fare.—

[*Caption.*]

That at the time mentioned in the petition the defendant was conductor and had charge of a certain passenger train on the railroad of the — Railway Company, running from — to —.

That one of the regulations of said company was that no person should be permitted to be and remain on such train without having a ticket therefor duly obtained, or without paying his fare on request [*or, and that, if a passenger had not so purchased a ticket, he is required to pay — cents extra fare*].

That at said time the plaintiff was on said train without having a ticket therefor, and then and there refused to purchase a ticket or pay his fare.

That defendant thereupon requested the plaintiff to leave said train, which the plaintiff refused to do; whereupon defendant then and there gently laid his hands upon the plaintiff and removed him from said train, without unnecessary violence, which is the same act complained of by the plaintiff.

NOTE.—Companies may require passengers to purchase tickets before getting upon a train, and, if they have failed so to do, may be required to pay an extra fare, and may be ejected upon refusal; and if no unnecessary force be used, they have no right of action. *Sage v. Railway Co.*, 88 N. E. Rep. 771 (Ind., 1898); *Falkner v. Railway Co.*, 55 Ind. 869; 57 Ind. 576; 28 Ind. 1; 46 Ind. 293. This defense must be specially pleaded. *Pier v. Finch*, 29 Barb. 170. As to force, see *Sanford v. Railroad Co.*, 28 N. Y. 343; *Kline v. Railroad Co.*, 89 Cal. 587; *Law v. Railroad Co.*, 82 Ia. 534.

CHAPTER 18.

ATTACHMENT.

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Sec. 235. When attachment will lie.—The remedy by attachment being an extraordinary one, a wise jealousy should be exercised when a creditor makes use of it to interrupt the ordinary business of a debtor, to close his doors and publish him to the community as an insolvent. The court should scrutinize the conduct and motive of the plaintiff and require him to make out a clear case.¹ The remedy is purely a creat-

¹ Egan v. Lumsden, 4 W. L. G. 161.

ure of statute and was unknown at common law;¹ nor can it be aided or corrected by a court of equity.² The law upon the subject will therefore be largely confined to statutes, and decisions thereunder, of a particular state, although there is uniformity in the statutes of the various states with regard to the grounds upon which attachment will issue.

The general rule is that in the absence of statute the writ will not issue in actions founded on tort, but is confined to actions based upon contract. The Ohio code³ provides that it may issue in civil actions for the recovery of money. This is broad enough to include actions for the recovery of damages in cases of tort, and it has been so held.⁴ Upon this point the various codes are not uniform, some restricting actions to cases where the common-law action of debt would lie. Prior to 1880, under the Ohio code, there was an exception, at least as to cases falling within the ground that the defendant was a non-resident, such cases being restricted to actions arising upon contract, judgment or decree.⁵ The rule has been modified since the revision of 1880, it having been provided that an attachment may be granted against a non-

¹ *Humphrey v. Wood*, Wright, 566.

² *Bigelow v. Andruss*, 81 Ill. 322.

³ Sec. 5531.

⁴ *Davidson v. Owen*, 5 Minn. 69; *Morrison v. Lovejoy*, 6 Minn. 183; *Morton v. Pearman*, 28 Ga. 323. See *ante*, p. 201, note 6.

⁵ Sec. 5521; 62 O. L. 10; S. & S. 549; S. & C. 1002. It would seem, therefore, that a remedy may be pursued upon all other grounds, whether the case be one on contract or in tort. Some question, however, was raised under the statute as it then existed as to actions against non-residents, the courts generally holding that cases brought upon that ground must clearly fall within the provisions of the statute and not partake of the nature of tort. *Pope v. Insurance Co.*, 24 O. S. 481; *Squair v. Shea*, 1 W. L. B. 99. For instance, it was held that an action for a breach of promise against a non-resident was an action sounding in tort, and did

not therefore fall within the statute, and that process could not issue against a non-resident defendant. *Conley v. Creighton*, 1 W. L. B. 364 (1876), affirmed in 2 W. L. B. 4 (1877). But this rule would not apply to an action brought against a defendant residing within the state to which, it being held that a writ of attachment is as plainly applicable to cases of this character as to cases of debt for the non-payment of money or of damages for the breach of any other contract. *Caldwell v. Spillman*, 7 W. L. J. 149 (Supr. Ct., 1849). It was also held under that statute that a writ of attachment could not be issued in a case against a garnishee who was a non-resident on the ground of non-residence, even though the garnishee appeared and answered to the merits of the action. *Squair v. Shea*, 1 W. L. B. 99; affirmed, 26 O. S. 645.

resident defendant for a debt or demand arising by reason of death caused by a negligent or wrongful act, so that actions may now be brought in cases sounding in tort resulting in the death of the injured party, the rule remaining the same as to all other torts.¹

There are other grounds for the issuance of a writ of attachment sufficiently broad to include cases not arising upon contract. The recovery of money for damages for an assault and battery may come under the ground that the debt was criminally contracted.² A suit by one partner against his copartner for the recovery of a balance due upon unsettled partnership accounts, although he seeks specific relief and the recovery of money, is none the less "a civil action for the recovery of money." If he shows his claim to be just, the existence of one of the grounds for attachment, and an amount due him, his rights may be protected by this proceeding as any other creditor or person having a demand for money.³ In an action for the recovery of money the plaintiff may, on the ground of non-residence, have an attachment against the property of a partnership, all the members of which are non-residents, which was formed to do business in Ohio, and service may be made at its usual place of business.* Judgment other than for the recovery of money or real property may also be enforced by this process.⁴ A party against whom an attachment is sought must himself sustain the relation of a debtor to the plaintiff in the action, and the debt must be a demand arising upon contract, judgment or decree, and not based upon judgment against a third party as a garnishee. An attachment can not be issued against a garnishee, based on a judgment in a case in which he was garnished, until a judgment has been rendered against him for an unsatisfactory answer, in which case an attachment can issue on the ground of non-residence.⁵ Attachment may be had in an action for breach of promise to marry.†

Sec. 236. Jurisdiction.—The court takes jurisdiction in attachment proceedings from the time of the issuance of the order of attachment so as to give it control of all subsequent proceedings; and the action will proceed even though a defendant die or the charter of a defendant corporation expire.⁶ A proceeding in attachment is a personal action, excepting where the defendant is before the court only by virtue of construc-

¹ R. S., sec. 5521.

⁴ R. S., sec. 5490; *Pennsylvania v.*

² *Sturdevant v. Tuttle*, 22 O. S. 111.

Howard, 14 O. S. 305.

³ *Goble v. Howard*, 12 O. S. 165,

⁵ *Gaughan v. McDonald*, 1 W. L. B.

163.

164.

* *Byers v. Schluppe*, 51 O. S. 300.

⁶ R. S., sec. 5560.

† *Halbert v. Armstrong*, 14 O. C.

C. 296.

tive service, in which case it is a proceeding *in rem*, binding merely the property attached and not enforceable *in personam*.¹ Jurisdiction in an action for money may be acquired over a non-resident defendant by service by publication.² It can be acquired over a non-resident defendant in attachment proceedings only by a levy upon the property. This fact must be established before the action can proceed to final judgment.³ Jurisdiction in such a case is complete, therefore, when the property has been attached, and cannot be ousted by an answer of a garnishee denying knowledge of property belonging to the defendant;⁴ and no time being prescribed in which service by publication shall be made, jurisdiction cannot be ousted for delay therein.⁵

A non-resident defendant who demurs to a petition brings himself as fully under the jurisdiction of the court as though served with a summons.⁶ An appearance for the sole purpose of objecting by motion to the mode or manner in which it is claimed jurisdiction has been acquired,⁷ or for the purpose of moving a discharge of the attachment, sued out upon the ground of concealment, so that service cannot be made,⁸ is not an appearance in the cause, nor a waiver of any defect in acquiring such jurisdiction. An appearance, however, for the purpose of contesting the merits of a case, whether by motion or formal pleading, will operate as a waiver.⁹ Nor can jurisdiction be acquired on the ground of non-residence of the defendant, where the petition and affidavit fail to show that the cause was one arising upon contract, judgment or decree,¹⁰ or where death has been caused by the negligent or wrongful act of another;¹¹ nor can it be acquired by an amendment of

¹ *Myers v. Smith*, 29 O. S. 120; *Bacher v. Shawhan*, 41 O. S. 271; *Eastman v. Wadleigh*, 20 Am. Rep. 695; *Vanta v. Wood*, 82 Ia. 469; *King v. Vance*, 46 Ind. 246; *Pennoyer v. Neff*, 95 U. S. 714; *Crumb v. Treiber*, 4 W. L. B. 616 (Cuyahoga, D. C.), cannot be regarded as stating the correct rule. It was formerly considered under the Ohio system as a proceeding *in rem*. *Cochran v. Loring*, 17 O. 425.

² *National Bank v. Railway Co.*, 21 O. S. 221.

³ *Myers v. Smith*, 29 O. S. 120; *Eagan v. Lumsden*, 2 Dian. 168.

⁴ *National Bank v. Railway Co.*, *supra*.

⁵ *Bacher v. Shawhan*, 41 O. S. 271.

⁶ *Myers v. Smith*, 29 O. S. 120.

⁷ *Smith v. Hoover*, 39 O. S. 249. See *ante*, sec. 119.

⁸ *Mawiecke v. Wolf*, 8 W. L. B. 458 (Ham. D. C., 1876).

⁹ *Smith v. Hoover*, *supra*. See *ante*, secs. 118-19.

¹⁰ *Pope v. Insurance Co.*, 24 O. S. 481.

¹¹ R. S., sec. 5521.

the petition and affidavit without the issuance of an attachment thereafter,¹ but such an attachment cannot enlarge the scope of the proceeding.²

The basis of jurisdiction against a non-resident defendant being the attachment of the property, if that be without legal authority the proceedings thereunder will be void; and an attachment which has been issued without the requisite affidavit is void, and seizure of property of a non-resident debtor thereunder, upon whom service of summons cannot be made, will not give the court jurisdiction over the defendant or his property, so as to authorize service by publication or an attachment in the action.³ A mere mistake, however, in the notice by publication will not vitiate an attachment properly issued and levied, and such irregularity, in the absence of any objection, will be immaterial.⁴

To give the court jurisdiction over personal property the officer should take it into actual possession, and if that is not done it may be taken in execution or attachment by any other creditor as if no previous writ had been issued.⁵ The jurisdiction of the court is not at an end where the answer of the garnishee shows that he is not indebted and has no property of the defendant.⁶ It has been held that where there is a judgment against the joint property of three persons, and the answer of the garnishee discloses the fact that there is an indebtedness to only two of them, the proceedings must be dismissed for want of jurisdiction.⁷ Under a former statute it was essential that there be an indebtedness, a non-resident and a levy upon property subject to the proceeding in order to give the court jurisdiction;⁸ and though a judgment rendered without the publication of notice was not void, it could be reversed on error.⁹

¹ Pope v. Insurance Co., *supra*.

⁷ Feidler v. Blow, 5 W. L. J. 405.

² Putnam v. Loeb, 2 O. C. C. 110; ⁸ Mitchell v. Eyster, 7 O. 257; Smead v. Chrisfield, 1 Handy, 578. Parker v. Miller, 9 O. 108.

See *ante*, sec. 127.

⁹ Paine v. Mooreland, 15 O. 435;

³ Endell v. Leibrock, 33 O. S. 254; 45 Am. Dec. 435. Judge Thurman in a dissenting opinion in Moore v. Eagan v. Lumsden, 2 Disn. 168.

⁴ Putnam v. Loeb, 2 O. O. C. 110.

⁵ Root v. Railway Co., 45 O. S. 222.

⁶ Penn. R. R. Co. v. Peoples, 31 O. S. 537; Myers v. Smith, 29 O. S. 120.

Starks, 1 O. S. 370, said: "Our attachment laws require notice of the issuing of the writ to be given by advertisement. Yet the want of such

Sec. 237. Parties.—A party against whom an attachment is sought must himself sustain the relation of debtor to the plaintiff in the action,¹ and a subsequent attaching creditor cannot properly be made a party on the ground that he acquired an interest in the property attached, and if so made a defendant he may be dismissed from the action.² Nor is a party who holds an attachment upon the lands of a debtor which have been seized under a writ of attachment a proper party to the action;³ nor is the garnishee considered a party to the proceedings.⁴

An indebtedness due to a copartnership cannot be garnished in the hands of a debtor to pay a separate debt due by one of the partners;⁵ nor a debt of another firm of which a member of the first copartnership is also a member;⁶ but the interest of a partner in partnership property may be attached to satisfy his individual indebtedness, although the rights of the individual creditor are postponed until the partnership creditors are satisfied;⁷ and where one of the partners has absconded and the other is disposing of the partnership effects, the process may issue against the partnership property;⁸ and so one partner may have an order of attachment, in an action against his copartner after dissolution of the partnership, to recover a general balance upon their unsettled accounts.⁹

While the process may issue against individuals who are non-residents, this rule cannot be extended to a non-resident partnership, as the statute relating to suits against a partnership by its firm name means only, a partnership which can be served with process at its place of business within the state.¹⁰

Under a former law it was held regular to bring a foreign attachment against the administrators of a deceased debtor

notice does not render the judgment void. The writ and levy give jurisdiction. The absence of notice makes the judgment voidable." See, also, *Sheldon v. Newton*, 3 O. S. 504.

¹ *Gaughan v. McDonald*, 1 W. L. B. 164.

² *Harrison v. King*, 9 O. S. 388; *Ward v. Howard*, 12 O. S. 153.

³ *Endell v. Leibrock*, 33 O. S. 354.

⁴ *Secor v. Witter*, 39 O. S. 218; *Crumb v. Treiber*, 4 W. L. B. 616.

⁵ *Myers v. Smith*, 29 O. S. 120.

⁶ *Buchanan v. Mitchell*, 8 W. L. B. 8.

⁷ *Stewart v. Hunter*, 1 Handy, 22.

⁸ *Sellew v. Chrisfield*, 1 Handy, 86-88.

⁹ *Goble v. Howard*, 12 O. S. 165.

¹⁰ *Crumb v. Treiber*, 4 W. L. B. 616; s. c., 2 *Clev. Rep.* 257. But see sec. 239, note 3.

in a case where such administrators would have been the proper parties could process have been served upon them personally.¹ Where property of a non-resident debtor has been attached, his wife cannot intervene as a party to show that the property attached was hers, as an interest in the attachment is not such an interest in the action as would enable her to intervene as a party and make a defense therein.²

Sec. 238. Some general rules of pleading.—The court in passing on a motion to discharge an attachment on the ground that the affidavit is insufficient will also look into the petition and exhibits, and if the affidavit fills all of the requirements, a petition may be amended without prejudice to the attachment;³ but after service it is not proper to file an amended petition setting up a new cause of action, as such practice would enable a party to keep an attachment alive by adding new causes of action from time to time, thus interfering with substantial rights and intervening claims;⁴ nor should the process be amended by inserting the individual names of a partnership which has been sued as a partnership.⁵

The affidavit and order of attachment constitute no part of a pleading; nor should the grounds of attachment be stated in the petition. This is also applicable to an action for a debt not due as in other actions.⁶ Nor can the petition and affidavit be amended by showing that the cause of action was one arising upon contract without the issuance of an attachment after amendment.⁷ Nor is it proper pleading to incorporate the affidavit in the petition, though an omission of the affidavit may be cured by incorporating into the petition all matters which should have been in the affidavit. But where the petition does not show that the claim is just, nor state the amount which the plaintiff believes he ought to recover, and is upon belief, then it will not supply the omission.⁸ The petition in a case where an attachment is had may, where it demands a less judgment, be amended.⁹

¹ *Mitchell v. Eyster*, 7 O. 251.

⁶ *Harrison v. King*, 9 O. S. 388.

² *Boyer v. Maginnis*, 20 W. L. B. 471.

⁷ *Pope v. Insurance Co.*, 24 O. S. 481.

³ *Constable v. White*, 1 Handy, 44.

⁸ *Endell v. Leibrock*, 33 O. S. 254.

⁴ *Smead v. Chrisfield*, 1 Handy, 573.

⁹ *Puckett v. Richardson Drug Co.*, 20 S. W. Rep. 1127 (Tex., 1892).

⁵ *Dobell v. Loaker*, 1 Handy, 574.

Sec. 239. Against non-resident debtors.—The first ground for an attachment prescribed by statute¹ and a common one in all states is when a defendant debtor, or one of several defendants, is a foreign corporation or a non-resident. It is provided, however, that an attachment shall not be granted upon this ground for any other claim than a debt or demand arising upon contract, judgment or decree, or for causing death by a negligent or wrongful act. In considering the decisions under this section it must be remembered that the latter clause was added by the revision of 1880.² The manner of acquiring jurisdiction in proceedings upon this ground has been pointed out in a preceding section.³ Absence from one's home for a year when the party left with the intention to return, and that intention is not in the meantime destroyed by some act signifying a purpose to change his domicile, does not defeat his right to claim his former residence as if it had never been interrupted by his absence and will not furnish ground for attachment;⁴ and a party who has business in one state and lives in another city with his family which is in another state will be considered a non-resident of the state in which he transacts business, and his property subject to attachment under this ground;⁵ but an order of attachment cannot issue against a non-resident garnishee under this ground even though the garnishee appear and answer to the merits of the proceedings.⁶ An attachment may be had, however, by one partner against his non-resident copartner after dissolution to recover a balance due upon their unsettled partnership accounts;⁷ or the writ will also issue against a non-resident partnership all of whose members reside outside of the state, but which is formed for the purpose of doing business within the state. Service may be made in such case by leaving a copy at the usual place of business within the state.⁸

A corporation is a twofold organization, and, so far as its

¹ Sec. 5321.

² *Ante*, sec. 235.

³ *Ante*, sec. 236.

⁴ *Eagan v. Lumsden*, 2 Disn. 175; *Merchants' Bank v. Insurance Co.*, 1 Disn. 469; *Smith v. Dalton*, 1 C. S. C. R. 150; *Watson v. Pierpont*, 7

Mart. 418; *Drake on Attachment*, sec. 80.

⁵ *Barry v. Bockover*, 6 Abb. Pr. 374.

⁶ *Squair v. Shea*, 26 O. S. 645.

⁷ *Goble v. Howard*, 12 O. S. 165.

⁸ *Byers v. Schluppe*, 51 O. S. —.

relations to the state are concerned, is both foreign and domestic.¹ So a railroad company incorporated under the laws of one state operating its lines in another is liable to service of garnishment in the latter as are domestic corporations;² and where rolling-stock of a railroad company is temporarily in a state other than its domicile and is there attached, a receiver appointed by a court in its domicile may, by virtue of the comity existing between the states, bring an action in the latter state to recover the possession when it will not conflict with the rights of the citizens of the latter state nor violate its public policy.³

A plaintiff may, as soon as an action has been commenced and an order of attachment obtained against a foreign corporation, proceed to make service by publication, and cannot be postponed in obtaining a judgment, in a case where the attachment has been only served by notices to garnishees until by further answer it shall appear that they, or some of them, are indebted to the defendant.⁴ A foreign insurance company may be made a garnishee by serving copies of the orders of attachment and notice upon a managing agent of the company.⁵

An attachment may be levied on property of a non-resident defendant situated in a county other than the one where the attachment is sued out. If there is also property in the county where the action is brought, a valid lien will be obtained on the property in both counties.⁶ While a citizen must be sued in the state of his residence or where he can be found, as to a non-resident one county of the state is the same as another, and it is purely a matter of domestic regulation as to when and upon what process property found within a state shall be applied to claims of a creditor of a non-resident debtor. An attachment may be had against a non-resident stockholder in a domestic corporation;⁷ or by one partner against his non-resident partner;⁸ or by a surety against a non-resident prin-

¹ *State v. Railway Co.*, 18 Md. 193;
Railroad Co. v. Gallahue, 12 Gratt.
655; *Sprague v. Railway Co.*, 5 R. L.
333.

² *Penn. R. R. Co. v. Peoples*, 31 O. S.
587.

³ *Merchants' Bank v. McLeod*, 7 W.
L. B. 307; 38 O. S. 174.

⁴ *Vallette v. Bank*, 2 Handy, 1.

⁵ *Rock v. Raney*, 15 W. L. B. 333.

⁶ *Platt & W. Refining Co. v. Smith*,
21 W. L. B. 122.

⁷ *National Bank v. Railway Co.*, 21
O. S. 221.

⁸ *Goble v. Howard*, 12 O. S. 165.

cipal debtor;¹ although such surety cannot in his own behalf, upon the ground that fraudulent representations have been made to him by his principal, sustain such an action against the latter on the ground of non-residence, to enforce payment of claims either due or not due in the hands of a third party.² A garnishee, however, in an action against a foreign firm who has admitted possession of money belonging to such firm, and judgment has been rendered against him, cannot in a suit for such money defend against its payment upon the ground that a foreign firm cannot be sued in its firm name.³ And an action for the recovery of commissions by a real-estate agent under a contract that he should have all over and above a certain sum, the owner refusing to accept an offer in accordance therewith, is a demand arising upon contract for which an attachment may be had on the ground of non-residence.⁴

Sec. 240. Against absconding debtors.—Property of a person who has absconded with the intent to defraud his creditors may be attached.⁵ “To abscond, in a legal sense, is to hide, conceal or absent one’s self clandestinely, with the intent to avoid legal process.”⁶ An intent without actual absconding will not of course be sufficient.⁷ And so with a debtor who has no intention of absconding, but who, after he is once out of the jurisdiction, remains away with an intent to defraud his creditors.⁸ The fact that one member of a firm has absconded will constitute good ground of attachment against the partnership property. So where one partner absconds and the other disposes of a portion of their property, it will be presumed that they intended to so delay and hinder their joint

¹ *Brannin v. Smith*, 2 Disn. 436.

² *Brannin v. Smith*, *supra*.

³ *Critchell v. Cook*, 2 W. L. B. 97.

⁴ Under a former statute it was held that a foreign attachment could not be sustained against one of several joint and several contractors (Codwin v. Hurford, 4 O. 183 — Statute of 1810), and under a later one that an attachment could not be sued out and maintained against one

of several contractors who was a resident of the state and others were non-residents. *Taylor v. McDonald*, 4 O. 150.

⁵ R. S., sec. 5031.

⁶ *Bennett v. Avant*, 2 Sneed, 152; *Field v. Andreon*, 7 Md. 209; *Stouffer v. Niple*, 40 Md. 477.

⁷ *Kingsland v. Worsham*, 15 Mo. 657.

⁸ *Hafern v. Davis*, 10 Wis. 501.

creditors as to furnish a sufficient ground for attachment.¹ It is held, however, in New York that where one of two partners has been guilty of fraudulent acts on account of which he absconded, and the other one remains in the state carrying on the partnership business, and has not been guilty of any actual misconduct, an attachment can be had only against the property of the absconding partner.² To constitute an absconding debtor it is not essential that he go out of the state, as a person who shuts himself up or hides away from his creditors may be so considered.³ An affidavit which sets forth the nature of a claim upon which the action is founded, and alleges "That the said ——— has absconded with the intent to defraud his creditors; and further, that the said ——— is about to dispose of his property with the intent to defraud his creditors," is sufficient.⁴

Sec. 241. Left the county of residence.— Where a defendant has left the county of his residence to avoid service of summons is the third ground of attachment.⁵

Sec. 242. Concealment of defendant.— The fourth ground for an attachment is where a defendant conceals himself so that a summons cannot be served upon him;⁶ and when the process is sued out upon this ground, it is not necessary that a summons be issued and returned not found before attachment can be had.⁷ False information given by a debtor as to his whereabouts amounts to concealment;⁸ and so with concealment for even a short period of time with the intention to avoid and defraud creditors so as to make some disposition of his property.⁹ It is held, also, that an attachment will issue against a debtor who is notoriously residing abroad whether permanently or temporarily.¹⁰

Sec. 243. Debtor removing property.— Where a defendant is about to remove his property or a part thereof out of the jurisdiction of the court with the intent to defraud his credit-

¹ *Sellew v. Chrisfield*, 1 Handy, 87.

² *Bogart v. Dart*, 25 Hun, 395.

³ *Ives v. Curtis*, 2 Root, 133.

⁴ *Gans v. Thompson*, 11 O. S. 579.

⁵ R. S., sec. 5521.

⁶ R. S., sec. 5521.

⁷ *Mawicke v. Wolf*, 2 W. L. B. 86 (Ham. D. C., 1877).

⁸ *North v. McDonald*, 1 Dian. 57.

⁹ *Young v. Nelson*, 25 Ill. 565. See *Gerard v. Tompkins*, 12 Barb. 373.

¹⁰ *In re Thompson*, 1 Wend. 43.

ors, an attachment will issue.¹ It is essential that it be made to appear that he is removing his property with fraudulent intent, as the statute requires it.² If, however, he has left sufficient property within the jurisdiction to satisfy his debts, there can be no ground, but the property removed must be of such a quality as to materially interfere with his ability to meet his debts in the domestic court.³ Under a similar statute, it has been held that a merchant not having sufficient property to pay his debts, who invests a material portion of his assets in goods which he ships out of the state, is liable to attachment, and that it is not necessary that the plaintiff should show that such removal was fraudulently made. That the fact of the shipment of goods without the jurisdiction of the state was usual and customary for the defendant, who was engaged in business, will not constitute a defense.⁴

Sec. 244. Converting property into money.—The sixth ground of attachment is where the defendant is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors.⁵ An affidavit charging defendant with having disposed of part of his property, and about to dispose of the remainder with intent to delay and defraud his creditors is sufficient under this provision,⁶ as the assignment of any portion of his property will authorize an attachment to issue.⁷ The affidavit should show either that the property has been disposed of or that the debtor is about to dispose of it, or that he has disposed of part or is about to dispose of part.⁸

Sec. 245. Concealing property.—If the defendant has property or rights of action which he conceals an attachment will issue.⁹ This may be a misrepresentation of facts as to property as well as concealment.¹⁰

¹ R. S., sec. 5021.

² Hunter v. Soward, 15 Neb. 215.

³ Friedlander v. Pollock, 5 Cold. 490; White v. Wilson, 10 Ill. 21.

⁴ Mack v. McDaniel, 2 McCrary, 198.

⁵ R. S., sec. 5521; Flannigan v. Donaldson, 85 Ind. 517.

⁶ Auerbach v. Hitchcock, 28 Minn. 78.

⁷ Johnson v. Laughlin, 7 Kan. 359; Weiller v. Schreiber, 68 How. Pr. 491; Taylor v. Myers, 34 Mo. 81.

⁸ Johnson v. Buckel, 20 N. Y. 566.

⁹ R. S., sec. 5521.

¹⁰ Powell v. Matthews, 10 Mo. 49; Anderson v. O'Reilly, 54 Barb. 620.

Sec. 246. Fraudulent assignment.— While an attachment may be had under the statute where the debtor has assigned, removed, disposed of, or is about to dispose of, his property or a part thereof, with intent to defraud his creditors,¹ yet, as it is an extraordinary remedy, a creditor must bring his case within the letter of the law in order to avail himself of it. When the statute provides that there must be an attempt to defraud creditors, to furnish a ground for an attachment, resort cannot be had to the doctrines of equity in determining whether or not there is fraud in a given case, as a court of equity will often hold acts to be fraudulent when there is no intent, and such a rule is not applicable to cases of attachment based on this ground. Constructive fraud is not sufficient ground to support an attachment, and an actual and intentional fraud must be shown,² and the affidavit must state facts sufficient to show such intent. Facts reasonably authorizing belief of such an intent are insufficient;³ and the burden of establishing such fraudulent intent, where it is controverted, rests upon the plaintiff, and it cannot be done by saying that the debtor was insolvent, or that he was merely trying to dispose of property, without showing that he had another object.⁴

A person engaged in business who, upon finding himself embarrassed and insolvent, turns his business into a corporation, taking shares of stock therein, under the honest belief that he was thereby better providing for his creditors, and with that intention, cannot be considered to have such a fraudulent intent as to afford ground of attachment;⁵ nor can an attachment be issued against a debtor upon the ground

¹Sec. 5521.

²Union Rolling Mill Co. v. Packard, 1 O. C. C. 76; Chamberlain v. Strong, 8 W. L. G. 281; Shove v. Farwell, 9 Bradw. 256; Eaton v. Wells, 18 Minn. 410; Bowen v. Girkelson, 7 Ia. 508; Spencer v. Deagle, 34 Mo. 455; Hines v. Fagebank, 9 Minn. 68; Pittman v. Searcey, 8 Ia. 352; Johnson v. Field, 62 Ind. 377. There must be as much evidence as

would be essential to maintain an action based on fraud. Bank v. Meehan, 20 N. Y. S. 766.

³Ely v. Hanks, 1 W. L. M. 107.

⁴Towle v. Lamphere, 18 Ill. App. 399.

⁵Beitman v. McKenzie, 11 W. L. B. 272 (C. S. C. R., 1884); Union Rolling Mill Co. v. Packard, 13 W. L. B. 491; Union Rolling Mill v. Packard, 1 C. C. 76.

that he has conveyed property to hinder creditors, where he has made a deed therefor upon an adequate consideration which has been recorded, expecting that his grantee will accept the same and pay the amount of such consideration, but which he fails to do, as without the grantee's acceptance thereof, there is no conveyance; such a transaction might support an attachment upon the ground that the debtor was attempting to convey his property.¹ But it has been held that a conveyance made without consideration by a debtor whose solvency is doubtful, to his wife, without any actual intention to defraud his creditors, will not sustain an attachment, even though it might justify a bill to set the same aside.² Fraud may, however, sometimes be presumed where a party largely in debt transfers property without any consideration, or gives a mortgage without consideration.³

Sec. 247. Debt fraudulently or criminally incurred.—

Some difficulty has been experienced in construing the last ground, viz.: that the defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be brought.⁴ The construction placed upon the provision when it contained only the ground "fraudulently contracted the debt or incurred the obligation" was that the debt or obligation must be one arising upon contract, and that recovery could not be had for unliquidated damages not thus arising.⁵ The decisions under the later statute⁶ have settled the question, holding that an attachment may be issued in an action to recover damages for fraud in obtaining goods under a contract induced by false representation. The fact that there has been a levy and sale thereunder will not constitute a waiver of the fraud and performance of the contract.⁷ And where brokers have sold certain stock for another, received the money and converted the same to their own use, they have fraudulently incurred an obligation.⁸ Where a person

¹ *Pierce v. White*, 22 W. L. B. 98. Co., 1 Disn. 469 (1857). See *Drake on*

² *McFarlan v. Mills*, 4 W. L. B. 1064. Attachment, sec. 10.
(Ham. D. C.).

³ S. & C. 550, amended Feb. 16,

⁴ *Curtice v. Hoadly*, 29 Kan. 566, 1865.

Taylor v. Kuhuke, 26 Kan. 132.

⁷ *Dean v. Yates*, 23 O. S. 388.

⁶ Sec. 5521.

⁸ *Este v. Wilkshire*, 44 O. S. 636. The

⁵ *Merchants' Bank v. Insurance* Hamilton county, Ohio, district court.

has represented that he owes a certain sum of money, whereas he is indebted in a much larger sum, such representations cannot furnish a ground for an attachment for fraudulently incurring a debt, where it does not appear that the debtor knew the statement to be false or knew or had reason to know that the creditor would rely on it.¹ Where an employee of a debtor, who has information that the latter is about to make an assignment, procures certain property of the debtor to be taken into another state, and there attaches it upon the ground of non-residence of the defendant, such an attachment will be deemed fraudulently procured, and set aside upon motion.² Under the amended statute, with the words "or criminally" inserted,³ in cases in which the element of criminality is presented, the term "obligation," as used in the statute, is equivalent to liability; and hence an attachment will lie in a civil action to recover unliquidated damages for assault and battery, upon the ground that the debt or obligation has been fraudulently or criminally contracted.⁴ An affidavit setting forth that the action was brought for the recovery of damages for unlawfully assaulting, beating, bruising and shooting plaintiff sufficiently shows that the defendant "criminally incurred the obligation," within the meaning of

held that where a commission merchant sells goods intrusted to his care, and appropriates the proceeds arising therefrom, and refuses to account for the same, an attachment cannot issue in an action for the recovery of the amount upon the ground that the debt was fraudulently incurred. *Devinney v. Smith*, 1 W. L. B. 481.

¹ *Bullock v. Mitchell*, 16 W. L. B. 354 (C. S. C., 1886).

² *Kizer v. George*, 19 W. L. B. 257.

³ S. & C. 550, amended Feb. 16, 1865.

⁴ *Sturdevant v. Tuttle*, 22 O. S. 111. The question was raised in this case that the terms "debt" and "obligation" were restricted to cases originating in contract, and the court,

without assuming to determine what rules held in cases of this kind in which the element of criminality is wanting, held that where this element is present the term "obligation" was the same as "liability," and that there were many cases in which criminality may be present without any fraud, as in larceny, arson, libel, injury to the person, and the like, and that unless the act as amended was held applicable to such cases it would otherwise be meaningless. See *Drake on Attachment*, sec. 10; *Kirk v. Whitaker*, 22 O. S. 115. The word "criminally" was inserted after the word "fraudulently." *Creasser v. Young*, 81 O. S. 57.

the statute.¹ The terms "fraudulently" and "criminally" are not synonymous, but separate and distinct grounds of attachment.² A construction has been placed upon this provision that one who purchases goods without any intention to pay fraudulently contracts the debt.³

Sec. 248. Attachment before debt due.—A creditor may bring an action upon his claim before it is due and have an attachment against the property of his debtor when the latter has either sold, conveyed or otherwise disposed of his property with the intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or that he is about to make a sale, conveyance or disposition of his property with such fraudulent intent; or that he is about to remove his property or a material portion with the intent to cheat or defraud, hinder or delay his creditors.⁴ Before the action is brought or the attachment granted the creditor must make an affidavit showing the nature and amount of his claim, that it is just, when it will become due, and show the existence of any of the grounds just enumerated.⁵ The rules applicable to the affidavit to be made in this case are the same as where the debt is past due.⁶ The court in granting the order of attachment must specify the amount for which it is allowed,⁷ and it shall not be issued until an undertaking has been given by the plaintiff as required in cases where the debt is past due.⁸ Judgment, however, cannot be rendered upon a claim before it becomes due, but the proceedings in an attachment may be conducted without delay,⁹ and are the same as in cases of attachment where the debt is past due. The statutes relating to attachment before debt due embrace claims against indorsers of bills of exchange and promissory notes which may be held by a holder of such notes. The contract of an indorser of a bill or note extends to the full amount for which it is drawn, and if the conditions are broken

¹ *Creasser v. Young*, 81 O. S. 57.

² *Brownell v. Heating Co.*, 13 W. L. B. 35; *Sturdevant v. Tuttle*, 22 O. S. 114; *Kirk v. Whittaker*, 22 O. S. 115; *Creasser v. Young*, 81 O. S. 57. See sec. 249 as to requirements of affidavit upon this ground.

³ *Blackwell v. Fry*, 49 Mo. App. 638.

⁴ Sec. 5564.

⁵ Sec. 5565.

⁶ See sec. 249, *post*.

⁷ Sec. 5567.

⁸ Secs. 5523, 5562.

⁹ Sec. 5569.

the claim is then due as to all past;¹ and so an obligation to deliver goods on and after a certain day in payment for certain other goods constitutes a claim for which an action may be brought and an order of attachment obtained before the claim becomes due.²

Under these provisions, in order to justify an attachment, fraudulent intent to injure the creditor must actually exist; it is not sufficient that the actual or even necessary consequences of the sale are to hinder or delay creditors;³ and where proceedings have been discharged under this section, it is a matter of discretion whether the action shall be dismissed or allowed to proceed after the debt becomes due.⁴

Sec. 249. Requisites of affidavit.—The affidavit is of the greatest importance in the proceeding, as all subsequent steps may hinge on its validity; and a writ without the requisite affidavit may be void.⁵ A slight mistake, however, in stating the amount of the claim which may be clearly apparent will not be fatal.⁶ The affidavit may be made by the plaintiff, his agent or attorney,⁷ and it is not necessary that an agent or attorney so describe himself, as that may be shown by the testimony;⁸ nor is it essential that it should show why it was not made by the plaintiff himself, or that the facts stated therein were within the personal knowledge of the affiant.⁹ It has been held, however, that an agent must state affirmatively his personal knowledge of the truth of the matter.¹⁰

There are certain requirements of the statute as to what the affidavit shall contain which may be omitted without af-

¹ *Smead v. Chrisfield*, 1 Handy, 442.

² *Ward v. Howard*, 12 O. S. 158.

³ *Hydenheimer v. Osborne*, 1 Disn. 351.

⁴ *Ramsey v. Overraker*, 1 Disn. 569.

⁵ *Endell v. Leibrock*, 33 O. S. 254;

Waples on Attachments, p. 77; *Naples v. Tunis*, 53 Am. Dec. 779; *Miller v. Brinkerhoffer*, 47 Am. Dec. 242 (N. Y.); *Murphy v. Montandom*, 2 Idaho, 1048; 29 Pac. Rep. 851.

⁶ *Rainwater, et al. Co. v. O'Neil*, 82 Tex. 337.

⁷ R. S., secs. 5522-5530; *Billwiller v. Marks*, 16 N. Y. Supp. 541; *Sheldon v. Kibett*, 100 N. C. 408; *Givens v. Ganns*, 18 N. Y. Supp. 608.

⁸ *Winchester v. Pierson*, 3 W. L. J. 181; *Sutliff v. Bank*, 1 W. L. M. 214.

⁹ *White v. Stanley*, 29 O. S. 423.

¹⁰ *Phelps v. Wetherby*, 4 W. L. G. 404; *Jewett v. Howe*, 3 Watts, 147. The affidavit may be amended to show that it is made by an agent or attorney. *Tracy v. Gunn*, 20 Kan. 508.

fecting its validity as to creditors and purchasers; and these irregularities and omissions are considered waived unless advantage is taken of them by the debtor, but are not available to other creditors.¹ Strictly speaking, the affidavit required in attachment proceedings constitutes no part of the pleadings in the case, and it is not considered good practice to incorporate the same in the petition; but in some cases it is held that such a rule may be adopted when the statement in the petition is full and complete, and all the requisites of an independent affidavit, including the absolute verification, are incorporated therein;² and this is applicable alike to an action or debt not due.³ It is held, however, that the affidavit may be enlarged by incorporating the allegations of the petition therein by reference; as, for example, "that the nature of the claim, as set forth in the petition, reference to which is hereby made, and the averment thereof adopted and made a part of this affidavit," or, "that the defendant fraudulently incurred the obligation for which the suit is about to be brought under the circumstances and in the manner set forth in the petition;"⁴ that when the petition states all essential facts and is sworn to positively, it is sufficient. But unless it is specially referred to, and sworn to positively for the purpose of attachment, it will not answer.⁵

The practice adopted in injunction proceedings of stating the facts fully in the petition and then to swear positively to their truth in the affidavit thereto, with the additional statement that the affidavit is also made for the purpose of securing an injunction, has never been followed in attachment proceedings, although it has been intimated that there is as good reason for adopting such a course with respect to the latter as to the former.⁶

¹ Root v. Railway Co., 45 O. S. 222-8.

² Endell v. Leibrock, 33 O. S. 254.

³ Harrison v. King, 8 O. S. 388. It is said by Judge Yapple that it is the settled rule in Ohio that the sufficiency or insufficiency of the affidavit or attachment must be determined by the facts stated in it alone, and that the allegations or pleadings can-

not be considered to aid it in any way. Squair v. Shea, 1 W. L. B. 99; affirmed, 26 O. S. 645.

⁴ Stifel v. Bank, 16 W. L. B. 399 (C. S. C. R., 1866, Force, J.); Miller v. Chandler, 29 La. Ann. 88; Scott v. Donegey, 17 B. Mon. 321.

⁵ Harrison v. King, 9 O. S. 394-5.

⁶ Ketchum v. Phillips, 1 Clev. Rep. 9; Hughes v. Insurance Co., 1 Clev.

While the better practice is to set forth the facts and circumstances of the case in the affidavit, not merely stating the words of the statute, yet this rule has not always been followed. The court may, if it deems proper, act upon an affidavit which states the grounds for an attachment substantially in the language of the statute, upon the theory that it is a mere matter of form of practice, not affecting substantial rights of parties;¹ nor is it indispensable that the words of the statute be followed, if the affidavit contains language fully equivalent or clearly showing the grounds specified or intended. So an affidavit stating that the action is brought to recover damages for unlawfully assaulting, beating, bruising and shooting sufficiently shows that the obligation was criminally incurred.² So will an affidavit be sufficient which contains a statement of facts that will upon a reasonable construction justify a belief in its truth.³ Where the debt is past due the affidavit must show the nature of the plaintiff's claim, that it is just, the amount which he believes the plaintiff ought to recover and the existence of any one of the grounds enumerated;⁴ if for a debt before due, it must also show the nature and amount of the claim, that it is just, when it will become due, together with the existence of one of the enumerated grounds.⁵ The affidavit should not state the plaintiff's mere belief, as that the defendant has absconded with the intent to defraud his creditors, but should set forth the facts justifying such belief,⁶ and the fraudulent intent must be proved.⁷ So an affidavit which states several grounds in a disjunctive or alternative manner is not a compliance with the rule that the facts must be positively sworn to, and hence not sufficient, but must allege the facts in a positive manner; and one which states the grounds alternatively is fatally defective, and the attachment may be discharged for that reason.⁸ So an allega-

Rep. 125; *Brainard v. Rittberger*, 2 Clev. Rep. 154.

¹ R. S., secs. 5264-65.

² *Dunlevy v. Schartz*, 17 O. S. 640;

³ *Harrison v. King*, 9 O. S. 394;

Garner v. White, 23 O. S. 193.

Ganns v. Thompson, 11 O. S. 579;

⁷ *Burruss v. Trant*, 86 Va. 980; 14

Coaston v. Page, 9 O. S. 397.

S. E. Rep. 845.

² *Creasser v. Young*, 31 O. S. 57.

⁸ *Schatzman v. Stump*, 7 W. L. B.

³ *Emmett v. Yeigh*, 12 O. S. 335.

394 (Ham. C. P., 1880); *Rogers v.*

See form of affidavit in this case.

Ellis, 1 Handy, 48; *Drake on Attachment*, sec. 101, and cases cited.

⁴ R. S., sec. 5522.

tion in an affidavit that a defendant fraudulently or criminally contracted a debt, being disjunctive, is insufficient, as the words "fraudulently and criminally" are separate grounds.¹ An allegation of an account due the plaintiff, what it is for, when it is justly due, that recovery ought to be had therefor, and that the defendant is a non-resident, is sufficient to show the nature of the plaintiff's claim;² or that there is property or debts of a non-resident defendant which may be appropriated to the payment of the plaintiff's claim is sufficient to justify the plaintiff to proceed at once and make service by publication as soon as the action has been commenced.³ An affidavit has been held good which contains all the requirements of the statute, stating positively the amount due, but not the amount which the plaintiff believes he ought to recover.⁴ A plaintiff cannot without leave of court amend an affidavit in order that the existence of fraud in fact may be shown so as to validate the proceedings,⁵ but such an amendment may be made on leave of court, and it is not necessary that a new levy be made thereafter;⁶ but a new cause of action existing at the time of the commencement of the action cannot be brought in by amendment.⁷

Sec. 250. General form of affidavit.—

[Caption.]

A. B., the plaintiff herein [*or, the agent or attorney of the plaintiff herein*], makes oath that he has commenced an action against the said ———, defendant* [*describe the nature of the action, as: upon a promissory note made by said defendant for ——— dollars, etc.; or any other action*], and the said affiant, ———, also makes oath that the said claim is just, and that the said plaintiff ought, as he the deponent believes, to recover thereon ——— dollars. He also makes oath that said defendant [*here state the existence of any of the following grounds in the language of the statute, or giving facts and circumstances*] is a non-resident of ——— county, Ohio, is about to convert his property and credits or a part thereof into money for the purpose of placing it beyond the reach of

¹ Rogers v. Ellis, 1 Handy, 48; ⁶ Maxwell on Code Pldg., p. 585;
Creasser v. Young, 81 O.S. 57; Bates Struthers v. McDowell, 5 Neb. 491;
on Pleading, 285. Wadsworth v. Cheweney, 18 Iowa,

² Constable v. White, 1 Handy, 44. 576.

³ Vallette v. Bank, 2 Handy, 1.

⁷ Brookmire v. Rosa, 34 Neb. 227;

⁴ Sleet v. Williams, 21 O. S. 82.

51 N. W. Rep. 840 (1892).

⁵ Garner v. White, 28 O. S. 192.

his creditors; has absconded with intent to defraud his creditors; so concealed himself that a summons cannot be served upon him; is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; has property or rights of action which he conceals; has assigned, removed or disposed of, or is about to assign, remove or dispose of, his property, or a part thereof, with intent to defraud his creditors; fraudulently or criminally contracted the debt. [If garnishment desired, add: And said affiant further makes oath and says that he has good reason to and does verily believe that —, of and within said county of —, has property of the said defendant in his possession liable to be attached in this action, to wit: *[description of property.]* And said affiant states that the facts set forth in the foregoing affidavit are true.

A. B.

[Jurat.]

NOTE.—The facts stated in the affidavit should be sworn to positively and not upon belief. If it is desired to procure an attachment against more than one person, and there exist different grounds for attaching the property of the defendants, there should be separate affidavits prepared for each defendant.

Sec. 251. Form of affidavit stating circumstances and a particular ground.—

[Continue from * in sec. 250.] To recover the sum of — dollars, criminally contracted to the said plaintiff by said defendant, as damages for divers assaults and batteries committed upon the person of the said —, plaintiff, in the manner and form as charged in her petition; and the said affiant, —, says that the claim is just, and that there is now justly due to the said —, as damages which she has sustained by reason of said assaults and batteries, from said defendant, the said sum of — dollars, which she ought to have and recover from said defendant. Affiant further says that the said defendant is a non-resident of the state of Ohio and that he criminally incurred the obligation for which this suit has been brought.

NOTE.—*McDowell v. Nims*, 15 W. L. B. 359. See form in *Constable v. White*, 1 Handy, 45.

Affidavit by next friend.—

[Caption.]

The said —, being first duly sworn, deposes and says that she has commenced an action in said court, as next friend for —, an infant, against the said —, defendant, etc.

NOTE.—This has been held a sufficient declaration of agency. *McDowell v. Nims*, 15 W. L. B. 359.

Sec. 252. Undertaking, when required.—When a writ of attachment is sued out on the ground that the defendant is a non-resident of the state, it is unnecessary for the plaintiff to give an undertaking; in all other cases, however, the writ shall not be issued without an undertaking as required by statute.¹ Where an attaching creditor files the proper affidavit entitling him to an attachment, his failure to file the statutory undertaking for the indemnity of the defendant does not render the attachment absolutely void, but it is a mere irregularity, of which the defendant in attachment alone can take advantage.² And so the omission of the name of the surety in the body of the instrument does not affect the validity thereof or the obligation of the surety.³ This rule has been extended to an obligor in an undertaking for a second trial.⁴ A defendant may upon reasonable notice to the plaintiff move to require the latter to give additional security. If the court deem the bond insufficient, it may vacate the attachment and order a restitution of the property.⁵

The following will answer as a form of undertaking:⁶

We bind ourselves to the defendants, — — —, — — — and — — —, that the plaintiff, — — —, shall pay to the said defendants the damages, not exceeding \$ — — —, which they may sustain by reason of the attachment in this action, if the order therefor be wrongfully obtained.

Witness our hands and seals this — — day of — —, 18—.

— — —. [Seal.]
— — —. [Seal.]
— — —. [Seal.]

Sec. 253. Order of attachment — Issue, return and execution.—The order of attachment is directed and delivered to the sheriff,⁷ requiring him to attach such property as is provided may be reached belonging to the defendant within the county which is not exempt by law; the process may, however, be issued to the sheriffs of different counties, and several may, at the option of the plaintiff, be issued at the same time or in succession.⁸ The writ, if sued out at the commencement of the action, shall be returned at the same time

¹ R. S., sec. 5523.

² R. S., sec. 5561.

³ O'Farrell v. Stockman, 19 O. S. 296.

⁴ From Alexander v. Jacoby, 28 O. S. 358.

⁵ McLain v. Simington, 37 O. S. 484.

⁷ R. S., sec. 5524.

⁸ Partridge v. Jones, 38 O. S. 375.

⁹ R. S., sec. 5525.

the summons in the case is required to be returned.¹ When there are several orders of attachment against the same defendant they shall be executed in the order in which they are received by the officer and in the manner prescribed by the statute.² When several orders of attachment are issued in different counties and at the same time or in succession, a city is to be considered in such cases as a county. And when evidences of indebtedness are taken on a writ sent to another county, a receiver in such county may take possession thereof and proceed to collect them as in any other case.³ Issuing a general execution may not be considered as a waiver or abandonment of the priority acquired by the attachment, though the proceeds of such sale should be distributed according to such priority.⁴ The officer is required to go to the place where the property is and declare in the presence of two freeholders that he attaches the property.⁵ In order to make an effectual attachment of personal property it must be taken into the custody of the officer. It need not in all cases be actual, but must in every case be such custody as the nature of the subject attached will admit.⁶ The sheriff is entitled to the exclusive possession of partnership property, where he has attached the interest of an individual partner therein, until he sells that interest.⁷ A levy not made in the presence of two freeholders is binding upon third parties, but may be set aside by the defendant; but it is well performed if the declaration of levy is made in the presence of persons casually present.⁸ An official return made by a sworn officer in reference to facts which it is his duty to state in it is, as between the parties and privies to the suit, as well as others whose rights are necessarily dependent upon it, conclusive as to the facts therein stated until vacated or set aside by due course of law.⁹

¹ R. S., sec. 5526.

² R. S., secs. 5527, 5528.

³ Finell v. Burt, 2 Handy, 204.

⁴ Liebman v. Ashbacker, 36 O. S. 34.

⁵ R. S., sec. 5528.

⁶ Root v. Railroad Co., 45 O. S. 227;

1 Wade on Attachment, sec. 129;

Drake on Attachment, sec. 292a;

Waples on Attachment, p. 175; Free-

man on Execution, sec. 262; Minor

v. Smith, 13 O. S. 79; Murphy v.

Swadener, 33 O. S. 85.

⁷ Stewart v. Hunter, 1 Handy, 22-

As to seizure of partner's share, see

Nixon v. Nash, 12 O. S. 647; Place v.

Sweetzer, 16 O. 142; Sutcliffe v.

Dohrman, 18 O. 181; Story on Part.,

secs. 263, 264.

⁸ Outcalt v. Burnett, 1 Handy, 404.

⁹ Phillips v. Elwell, 14 O. S. 243, 244,

Sec. 254. What may be attached.—It is provided by statute that lands, tenements, goods, chattels, stocks, or interests in stocks, rights, credits, money, and the effects of a defendant in his county not exempt by law, may be attached and applied to the payment of the claim of the attachment creditor.¹ And where a debtor has sold his real estate, the purchaser who still owes the purchase-money thereon may be served as a garnishee and required to hold such money subject to the orders of the court. He may, however, pay the money into court and have the real estate released, the court holding the same in lieu thereof.² An attachment sued out against an undivided part of real estate held by an heir under a devise cannot be available by a purchaser who has acquired title thereto under a sale by the executor of the estate of the ancestor of such heir.³ Courts have held that a steamboat,⁴ the interest of a mortgagor in chattel property of which he is in possession after conditions broken,⁵ an equitable interest in real estate,⁶ and notes secured by mortgage,⁷ may be attached. And when judgment is rendered for the plaintiff in an action in which a party owing notes secured by mortgage is made a garnishee, the notes and mortgages are in legal effect assigned to the plaintiff in attachment so far as may be necessary to satisfy his judgment, and he may maintain an action to foreclose the mortgage.⁸ An indebtedness due a copartnership cannot be garnished in the hands of a debtor to pay the debt of one of the partners,⁹ although the interest of a partner in a partnership generally may be attached to pay his individual liability; and the sheriff may have the exclusive possession of the property until he sells the interest attached, subject to the right of the copartner to give bond to regain possession.¹⁰ The interest of a stockholder in a private corporation represented

and cases cited. As to effect of irregularities, see *Mitchell v. Eyster*, 7 O. 257.

¹ R. S., sec. 5524.

² *Core v. Oil Land Co.*, 40 O. S. 636.

³ *Smyth v. Anderson*, 81 O. S. 144.

⁴ *Secrist v. Insurance Co.*, 19 O. S. 416.

⁵ *Carty v. Fenstermaker*, 14 O. S.

457; *Root v. Davis*, 51 O. S. 29; 31 W. L. B. 148.

⁶ *Northern Bank v. Nash*, 1 Handy, 156.

⁷ *Alsdorf v. Reed*, 45 O. S. 658.

⁸ *Alsdorf v. Reed*, *supra*; *Secor v. Witter*, 39 O. S. 218; *Edwards v. Edwards*, 24 O. S. 411.

⁹ *Myers v. Smith*, 29 O. S. 120.

¹⁰ *Stewart v. Hunter*, 1 Handy, 22.

by certificates of shares registered in his name may be reached by garnishee process served upon the corporation; and if the owner thereof has pledged such certificates as security for a debt, with power to sell and transfer the same, an attaching creditor, upon default of payment of his debt, may reach the surplus after the payment of the debt due the pledgee.¹ Money due an heir from an administrator cannot be garnished until after an order of distribution has been made, as there is no indebtedness before the making of such order;² nor can an amount due on a promissory note, which has been transferred by indorsement, be garnished in the hands of the maker, whether he has had notice of the transfer or not, as a debt due to the original holder.³

While there is no provision for a sale of indebtedness taken under an order of attachment, the code provides that the same may be delivered to a receiver who may be appointed to collect and settle the same so that the proceeds may be applied to the payment of the judgment.⁴

A subject which has been attended with more difficulty is the attachment of property in the hands of public officers or which is in the custody of the law. At common law public officers, such as sheriffs, clerks, receivers, etc., were not liable to garnishment,⁵ and it was also held in Ohio that money in the hands of public officers could not be garnished because contrary to public policy. But by statute⁶ the process may be served on a sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation, or other officers, having in their possession any money, claim or any other property of the defendant in the attachment proceedings, or in which he has an interest, which will bind the money in their hands from the time of such service. This statute has been held broad enough to reach money in the hands of guardians and administrators.⁷ To attach property

¹ Norton v. Norton, 48 O. S. 509; ⁴ Finnel v. Burt, 2 Handy, 202. See
Haldeman v. Railroad Co., 2 Handy, sec. 262, *post*.
101; National Bank v. Railway Co., ⁵ Drake on Attachment, sec. 503
21 O. S. 221. et seq.

² Bentley v. Streathers, 5 W. L. B. ⁶ R. S., sec. 5581.
288.

³ Knisely v. Evans, 34 O. S. 158. ⁷ Arbaugh v. Myers, 9 W. L. B. 64
(C. P.).

held by an officer under a legal process he must be proceeded against as a garnishee, and it is not sufficient that he be merely notified by the officer holding the writ of attachment that he holds the same and by virtue of it attached the property.¹ Nor can personal property held on attachment by one officer be levied upon and seized under the writs in the hands of other officers. If the writ is not placed in his hands he must be proceeded against as a garnishee;² and this rule is not changed by the assent of the officer holding the property to the subsequent so-called levy.³

Exemption laws apply as well to property levied upon by attachment as by execution, and the debtor is not prevented from making his selection⁴ even after an order has been made for the sale of attached property.⁵ The earnings of a debtor for three months next proceeding a levy of attachment, or the issuance of an order for the collection of a debt, where the same were necessary for the support of his family, are exempt and cannot be attached.⁶

Sec. 255. Delivery of property to party found in possession — Redelivery bond.—If the owner or party in possession desires to retain the property attached, he may do so by giving the undertaking required by statute,⁷ to be kept by him until the termination of the action. The execution of the redelivery bond will not operate as a bar to an action on the attachment bond proper.⁸ The bond should be based upon the interest of the defendant in the property appraised,⁹ but it is not invalid even though the property be not appraised, and is approved by the sheriff instead of by the court.¹⁰ If the defendant so desires, he may furnish a redelivery bond for a whole or for a part of the property attached.¹¹ The theory upon which the bond is given is, that the defendant will perform the judgment of the court, and does not have special reference to payment or delivery to the plaintiff in the

¹ Lock v. Butler, 19 O. S. 587.

⁶ Snooks v. Snetzer, 25 O. S. 516;

² Lock v. Butler, 19 O. S. 587.

Baer v. Otto, 34 O. S. 11.

³ Bailey v. Childs, 46 O. S. 557 (R. S., sec. 5585).

⁷ R. S., sec. 5539.

⁴ R. S., sec. 5441.

⁸ Alexander v. Jacopy, 28 O. S. 353.

⁵ Closs v. St. Clair, 38 O. S. 530.

⁹ Stewart v. Hunter, 1 Handy, 22.

See, also, Chilcote v. Conley, 36 O. S. 545; R. S., secs. 5426-48.

¹⁰ Sheldon v. Sharpless, 1 W. L. M. 42.

¹¹ Keith v. Moore, 3 O. C. C. 432.

action,¹ but it is to enable him to supersede all proceedings under the attachment by giving security to perform any judgment that may be rendered against him in the action,² and is intended also to take the place of the attachment proceeding and of the property seized by virtue of the writ, the sureties thereon being bound to the same extent as the property of the debtor would have been bound had no undertaking been given.³ It is not invalidated even though the name of the surety be omitted in the body thereof.⁴ The execution of the redelivery bond, however, will not operate to estop the defendant from moving to discharge the attachment.⁵ Forms of bonds are always found with the proper officials, so that it seems useless to insert them here.

Sec. 256. Proceedings against a garnishee.—It is provided that when the plaintiff believes that any person, partnership or corporation has property belonging or due the defendant, upon making the proper affidavit to that effect ⁶ he may have such person, partnership or corporation served as a garnishee with a copy of the order of attachment, requiring him to appear as provided by statute and answer under oath as to what property may be in his possession or under his control, disclosing the amount owing by him to the defendant, whether due or not; and, if a corporation, any stock therein held by or for the benefit of the debtor.⁷ Garnishment is regarded by some authorities as a suit and the summons therein as process.⁸ Where the officer cannot take possession of the property in the hands of the garnishee, it is necessary that two services be made, viz.: one to bring in the garnishee, that is, the written notice requiring him to appear in court and answer, and the other to bring the property before the court, which is the

¹ *King v. Snow*, 2 Disn. 78.

² *Myers v. Smith*, 29 O. S. 120.

³ *Janes v. Platt*, 47 O. S. 262. See, also, *Sutro v. Bigelow*, 31 Wis. 527;

Hanna v. Int. Pet. Co., 28 O. S. 622; *Methodist Church v. Booker*, 18 N. Y. 468; *Lathrop v. Southworth*, 5 Mich. 448; *Towle v. Towle*, 46 N. H. 434; *Hurd v. Lodge*, 20 Pick. 58; *Sheppard v. Pebbles*, 38 Wis. 373.

⁴ *Morain v. Simington*, 7 W. L. B.

88.

⁵ *Eagan v. Lumsden*, 4 W. L. G. 161.

⁶ *Ante*, sec. 249.

⁷ R. S., secs. 5530-5547.

⁸ *Moore v. Stanton*, 22 Ala. 831; *Tunstle v. Worthington*, Hemp. 662; *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252.

order of attachment.¹ It being necessary, therefore, that a copy of the order be served upon the garnishee to bind the property in his hands, he cannot waive service thereof because there is nothing attached in his hands unless the service is properly made.² If the garnishee does not reside in the county in which the order of attachment is issued, the process may be served by the proper officer of the county in which he resides, or may be personally served.³ If the garnishee resides out of the state and is personally served he must answer before the clerk of the county where served, or where action is pending.⁴

Any property rights or credits found in the hands of a garnishee belonging to the defendant in attachment are bound from the time of service of the order, and in case of a public officer it will be a sufficient cause for not paying the money over to the plaintiff.⁵ If a corporation be the attaching creditor, it may by process upon itself reach the interest of a stockholder in the property of the corporation represented by the certificates of shares which he holds, as an attaching creditor may reach money or credits in his own hands by garnishee process as well as any other creditor.⁶ If property be found in the possession of the garnishee belonging to the defendant, or if it appear that he is in debt to the defendant, the court may order the delivery of the same, or the payment of the money into court, or allow him to retain the amount upon the execution of an undertaking to the plaintiff to the effect that the property shall be forthcoming or the money paid, as the court may direct.⁷ The garnishee may, however, pay the money owing the defendant to the officer holding the order, and shall be discharged for any money so paid;⁸ and he may also be discharged if judgment be rendered against the defendant, or if the garnishee deliver up all property and credits of the defendant in his possession or pay all of the

¹ R. S., sec. 5530; *Epstein v. Salorgne*, 6 Mo. App. 8; *Mosher v. Bartelow*, 6 Mo. 598.

² *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Raymond v. Rockland Co.*, 40 Conn. 401.

³ R. S., sec. 5533.

⁴ R. S., sec. 5532.

⁵ R. S., sec. 5531.

⁶ *Norton v. Norton*, 48 O. S. 509; *Lyman v. Wood*, 42 Vt. 118; *Coble v. Nomemaker*, 78 Pa. St. 501; *Drake on Attachment*, sec. 548. See *Knight v. Clyde*, 13 R. I. 193; *Crosby v. Harlow*, 38 Am. Dec. 276.

⁷ R. S., sec. 5550.

⁸ R. S., sec. 5548.

money due from him;¹ or, when the undertaking has been given by the defendant, as it is provided he may do, and the garnishee appears and answers, he may on application of the defendant be discharged.² But the defendant cannot ask such discharge because the answer fails to show any property in the hands of the garnishee, as the plaintiff is not precluded by such an answer; and when the garnishee either fails to answer, or the disclosure is not satisfactory to him, or if he fail to comply with the order of the court to pay the money or deliver the property, or to give an undertaking, he may be proceeded against by several actions on that ground, and judgment may be had in favor of the plaintiff for whatever property or credits may be found in his hands belonging to the defendant.³

The garnishee may also be proceeded against as for contempt when he fails to appear and answer.⁴ If he answers that he owes the defendant nothing, but that the defendant had in his possession a note which had been transferred to another party before service of process, the plaintiff, if he disputes that fact, cannot move to make the third party who holds the note a party to the action, but must pursue the remedy provided against the garnishee for an unsatisfactory answer;⁵ and the right of action against a garnishee passes by an assignment of the judgment obtained against the defendant in attachment, and an action may be brought thereon by the assignee in his own name;⁶ but a garnishee is not liable to an action under the code for failing to answer where no jurisdiction has been acquired against the defendant in attachment;⁷ nor can judgment be rendered against him before judgment has been obtained against the defendant.⁸ An action brought to enforce a liability against a partnership under the provisions of

¹ R. S., sec. 5553.

² *Myers v. Smith*, 29 O. S. 120.

³ R. S., sec. 5551; *Myers v. Smith*, *supra*; 18 O. S. 184; 24 O. S. 481; 26 O. S. 645; 2 C. S. C. R. 56.

⁴ R. S., sec. 5549.

⁵ *Sensheimer v. Huttenbauer*, 2 C. S. 3 R. 56.

⁶ *Whitman v. Keith*, 18 O. S. 184.

⁷ *Pope v. Insurance Co.*, 24 O. S. 481.

⁸ *Vallette v. Bank*, 2 Handy, 1. It has been held that an entry of a judgment by a justice of the peace against a garnishee upon his answer confessing his indebtedness before judgment against the defendant is regarded as a mere clerical error, and not cause for reversing the judgment against such judgment debtor. *Harper v. Richards*, 12 O. S. 219.

the statute may be either in the name of the firm or in the names of the persons who compose it, at the option of the plaintiff.¹

Sec. 257. Service upon garnishee and his liability.— If the garnishee be a person, a copy of the order and notice should be served on him personally or left at his usual place of residence; if a partnership, it should be left at its usual place of business within the county;² if a corporation, with the president or other principal officer, or the secretary, cashier or managing agent thereof; if a railroad company, service may be made upon any regular ticket or freight agent in the county where the railroad company is located.³ A foreign insurance company may be bound by service upon its managing agent.⁴ But where two companies are attempted to be made garnishee, one of which is located where the suit is brought and the other in another county, both being domestic companies, the order must be issued to the counties in which each is located;⁵ and a railroad company incorporated in one state, doing business in another, under the provisions of the code is liable to process of garnishment in the latter state in the same manner as are domestic corporations.⁶

Where service by publication is not completed until eight months after a summons has been returned not served, it does not invalidate the proceedings, as no time is fixed by the statute within which service by publication must be made.⁷ A foreign dissolved corporation may be served with process by publication the same as if it were not dissolved.⁸

An order of attachment binds the property from the time of service, and the garnishee stands liable to the plaintiff in attachment for the amount of money and credits in his hands due the defendant from the time of such service. When the property attached is in the hands of a consignee, his lien thereon is not affected thereby.⁹ And so money or any claim garnished in the hands of an officer binds the same

¹ *Whitman v. Keith*, 18 O. S. 184, 143.

² *Whitman v. Keith*, 18 O. S. 134.

³ R. S., sec. 5554.

⁴ *Rocke v. Raney*, 15 W. L. R. 888.

⁵ *Conahan v. Cullin*, 2 Disn. 1.

⁶ *Penn. R. R. Co. v. Peoples*, 31 O. S. 587.

⁷ *Bacher v. Shawhan*, 41 O. S. 271.

⁸ *Vallette v. Bank*, 2 Handy, 1.

⁹ R. S., secs. 5530-5538.

from the time of service of process of garnishment,¹ although money received by a sheriff on execution cannot be attached in his hands.²

In attaching property held under legal process it is not sufficient that he be merely notified by an officer holding the writ that he holds the same and by virtue thereof attaches the property.³ The levy of an attachment made without process of garnishment, in the same manner as in execution, has no greater force than a simple levy of execution.⁴ Where service of garnishment process has been made upon a bank which has given a certificate of deposit for a certain amount of money but mailed the same just prior to the service of such process, it will not be bound by such service, as the certificate passed completely out of the hands of the bank when it was mailed to the owner.⁵

The rights of a mortgagee of personal property who purchases a claim secured by a prior attachment lien thereon acquires an equitable lien as against an attachment levied subsequently to the mortgage. A garnishee is still liable to pay the interest on his indebtedness to the defendant, even after service of garnishment process upon him, and before the proceedings are concluded. If there are circumstances varying this rule, they may, like any other defense, be shown.⁶

If any question either of law or fact is raised as to the liability of a garnishee upon his answer, it cannot be disposed of on a summary motion, but the plaintiff must pursue his remedy against the garnishee as for an unsatisfactory answer.⁷

Sec. 258. Answer of garnishee.—The garnishee is required to make his answer before the clerk of the court in the county in which he resides, or, if outside of the state, before the clerk of the county in which he was served.⁸ The clerk is required to transmit the same to the county where the suit is pending in the same manner as depositions are forwarded.

¹ R. S., sec. 5531.

² Dawson v. Holcomb, 1 O. 275 (1824).

³ Lock v. Butler, 19 O. S. 587.

⁴ Shorten v. Drake, 38 O. S. 76.

⁵ Howes v. Hartness, 11 O. S. 449.

⁶ Candee v. Webster, 9 O. S. 452;

Mackay v. Hodgson, 9 Pa. St. 468;

Norris v. Hall, 18 Me. 332; Ga. Ins.

Co. v. Oliver, 1 Ga. 38; Prescott v.

Parker, 4 Mass. 170; Stevens v.

Gwathney, 9 Mo. 636.

⁷ Martin v. Gayle, 2 Disn. 36.

⁸ R. S., sec. 5532.

The garnishee must answer under oath all questions put to him concerning property in his possession, or money or credits due the defendant, and, if a corporation, any stock therein held by or for the benefit of the defendant at or after the service of notice.¹ It is not essential that technical rules of pleading be followed, or that the nature and character of his defense to the judgment be set forth at length, but he is required to disclose every fact within his knowledge which may show that he ought not to be charged. If he is in doubt as to his liability the simple fact should be stated; if he has no property belonging to the defendant, he should so state. A garnishee may, however, set up such defenses as he may have in order to protect himself, as where the property sought to be recovered has been attached by process issued by a court in another state;² or that a former garnishment has been issued and levied thereon;³ or that the plaintiff's judgment has been satisfied;⁴ or where the action is brought by a foreign partnership in its firm name when it should be in their individual names as in other cases.⁵ He cannot, however, set up a right in the defendant to hold the money in his hands under the exemption laws,⁶ or that he was absent from home at the time of the service, and that his agent, without any knowledge of the service of the process, paid the money over to the defendant before he had any knowledge of the proceedings.⁷ If the answer is not satisfactory to the plaintiff he may prosecute an independent action against the garnishee upon that ground;⁸ or a special examination may be had by a commissioner appointed for that purpose.⁹

In some states the answer of the garnishee is regarded as conclusive, while in others it is considered merely *prima facie* and may be controverted;¹⁰ but the practice in Ohio seems to be that plaintiff, when the garnishee answers and denies that he has any money in his hands belonging to the defendant,

¹ R. S., sec. 5547.

Clark v. Averill, 76 Am. Dec. 181;

² B. & O. R. R. v. May, 25 O. S. 347.

Stanleys v. Raymond, 4 Cush. 814.

³ Critchell v. Cook, 2 W. L. B. 97.

⁷ Conley v. Chilcote, *supra*.

⁴ Gleason v. Gage, 2 Allen, 410.

⁸ Myers v. Smith, 29 O. S. 120; Alsdorf v. Reed, 45 O. S. 653.

⁵ Critchell v. Cook, 2 W. L. B. 97.

⁹ Whitman v. Keith, 18 O. S. 134.

⁶ Conley v. Chilcote, 25 O. S. 320.
Contra, Mull v. Jones, 33 Kan. 112;

¹⁰ Drake on Attach., sec. 651.

or when the answer is unsatisfactory for any reason, should bring an independent action against the garnishee, as the defendant would be entitled to if he had been compelled to sue the debtor.¹

Sec. 259. Form of answer of garnishee.—

[*Caption and formal averments.*]

E. F., garnishee, says: That he denies that he has now, or that he had at the time he was served with process herein, or at any time since then, any property of any description in his possession or under his control belonging to said defendant, or that he was then, or at any time since then, indebted to said defendant, or has or had then, or at any time since then, the control or agency of any property, moneys, credits or effects of said defendant.

Wherefore this respondent asks that he be dismissed from this action.

Sec. 260. Answer of garnishee bank.—

[*Caption.*]

That the business hours of their bank are from — o'clock A. M. until — o'clock P. M.; that process and notice of the attachment was not served on either of the partners until after — o'clock on the evening of —; was then served upon them at their dwelling-house. That during the forenoon of the same day the said bank had collected for F. C. M. — dollars, for which, by his request, they issued a certificate in the following terms: [*copy of certificate*]; that this certificate, at the request of said F. C. M., was duly mailed by the said bank, at C., on the day of its date, during business hours, in an envelope directed to F. C. M., at —, in the state of —, where he then resided, and so passed out of their control. That the C. mail for — at that time closed at — o'clock P. M., and that by the usual course of the mail said certificate was received at —, the home of the said F. C. M., on the morning of the — day of —, 18—. That on the morning of the — day of —, 18—, they received said certificate from the Peninsular Bank, located at —, for payment; and that when so presented for payment it had been, and was, properly indorsed to said bank, and as they believe in the usual course of business, in good faith, and for good consideration; and that said bank was and is the absolute owner and holder of the same; and that the respondents are legally liable to pay the amount thereof to said bank according to its tenor. They deny having in their possession or within their control any money, choses in action or property of F. C. M., and that the plaintiff is not entitled to

¹ *Straub v. Mull & Fanger*, 5 W. L. B. 441 (Ham. D. C., 1880).

subject the amount for which said certificate was issued to process of attachment, and ask that the same be dismissed as to this respondent, and for costs.

Sec. 261. Several attachments upon the same property. Different attachments may be made by the same officer upon the same property, and in such cases only one inventory need be made;¹ but personal property held under an attachment by one officer cannot be levied upon under a writ in the hands of another officer, even with the consent of the latter.² When a subsequent attachment is made on real property under subsequent orders, it should be made as in other cases;³ and if the process be against personal property it shall be attached as in the hands of the officer, and subject to any previous attachment, and if the property is in the hands of a garnishee which has been attached before, a copy of the order shall be left with him as in other cases.⁴ When several attachments are executed on the same property, or the same person is made a garnishee by several parties, the court may, on motion of any one of the plaintiffs, order a reference to ascertain and report the amounts and priorities of the several attachments.⁵ A subsequent attaching creditor cannot properly be made a party on the ground of an interest acquired by the levy, yet he may come in by motion and be heard as to any question of priority of liens, in the satisfaction of their respective judgments, and in the distribution of the fund in the hands of the officer.⁶ A suit may be maintained by an attaching creditor of personal property which is in the hands of a sheriff for the purpose of removing clouds upon it by mortgage or otherwise which will affect its sale, but the same cannot be prosecuted before the liability of the defendant in the attachment proceedings has been determined by judgment.⁷

Sec. 262. Receiver for property attached.—A receiver may be appointed by the court either in vacation or during term

¹ R. S., sec. 5535; *Bailey v. Childs*, 46 O. S. 557.

² *Bailey v. Childs*, *supra*.

³ R. S., sec. 5528.

⁴ R. S., secs. 5530-5536. As to officer's return in such cases, see sec. 5537.

⁵ R. S., sec. 5559.

⁶ *Harrison v. King*, 9 O. S. 838; *Ward v. Howard*, 12 O. S. 158; *Putman v. Loeb*, 2 O. C. C. 110-114. See, also, *Leibman v. Ashbacher*, 36 O. S. 94; *Norton v. Norton*, 43 O. S. 509.

⁷ *Voss v. Murray*, 29 W. L. B. 88, s. c., 50 O. S. 19; *Sherman v. Fitch*,

time to take charge of the property attached upon good cause being shown; and the receiver shall give a bond as is provided in other cases.¹ It shall be the duty of the receiver to take possession of all notes and other evidences of debt which have been seized by the sheriff or other officer as the property of the defendant in attachment and proceed to settle and collect the same, and to commence and maintain actions in his own name for that purpose; but in such actions no right of defense shall be impaired or affected.² Such receiver may also take possession of evidences of indebtedness which may be taken under an order of attachment sent to another county, and proceed to collect them as in other cases.³ Notice shall be given of his appointment to the person indebted to the defendant in attachment, either by written or printed notice served personally upon the debtor, or by copy left at his residence, and the debtor shall stand liable to the plaintiff in attachment for the amount of money and credits of the defendant in attachment in his hands from the date of service, and shall account therefor to the receiver.⁴ The receiver shall report his proceedings and hold all money collected by him and any property which may come into his hands subject to the order of the court.⁵ When a receiver is not appointed the officer who attaches the property shall have all the powers, and perform all the duties, of a receiver appointed by the court, and may, if necessary, commence and maintain actions in his own name as such officer; and he may be required to give security other than his official undertaking.⁶

Sec. 263. Discharge of attachment.—A defendant may have an attachment discharged in three ways: by executing a bond for restitution of the property,⁷ by making a motion for that purpose,⁸ or by a judgment rendered in his favor.⁹ The giving of a bond by the defendant will also discharge a garnishee for any property which may be found in his hands;¹⁰ but the defendant cannot ask the discharge on the ground

98 Mass. 59; Jones on Chattel Mortgages, sec. 848.

¹ R. S., sec. 5539.

² R. S., sec. 5540; Woodburne v. Scarborough, 20 O. S. 57.

³ Finsel v. Burt, 2 Handy, 204.

⁴ R. S., sec. 5541.

⁵ R. S., sec. 5542.

⁶ R. S., sec. 5543.

⁷ R. S., sec. 5545.

⁸ R. S., sec. 5556.

⁹ R. S., sec. 5554.

¹⁰ R. S., sec. 5544.

that the answer of the garnishee fails to show any property in his hands.¹

The undertaking may be executed during vacation and in the presence of the officer, while the writ is in his hands, or before the clerk after the return of the order, the same to be approved in either case by the officer before whom it is taken.² If there be no ground for attachment, the fact that the defendant has given a bond will not operate to estop him from moving to discharge the attachment.³

A motion to discharge an attachment may be as to the whole or to a part of the property, and may be heard by the court in vacation as well as during the regular session.⁴ This right should be limited to cases where the defendant shows an interest in the motion, although where the ground is that the attachment is wrongfully obtained no question as to the interest of the defendant in the property attached will prevent an inquiry into the grounds thereof.⁵ Such a motion may be made upon the ground that the affidavit is insufficient,⁶ in which case the court will not look into the petitions and exhibits,⁷ or into the question whether the property was fraudulently brought into the state for the purpose of attaching it.⁸ A motion to discharge cannot be made upon the ground that the property does not belong to the defendant;⁹ nor will an attachment be discharged on the ground that it appears from the answer of the garnishee that he is not indebted or has no property in his possession belonging to the defendant;¹⁰ but where an answer of a garnishee shows that there was nothing due from him to the plaintiff, which is not objected to within a reasonable time, and is apparently drawn

¹ *Myers v. Smith*, 29 O. S. 120; Penn. R. R. Co. v. Peoples, 81 O. S. 537; *ante*, sec. 258.

² R. S., sec. 5546; *Hartwell v. Smith*, 15 O. S. 200.

³ *Eagan v. Lumsden*, 2 Dian. 168; *Williams v. Shipwith*, 4 Ark. 529.

⁴ R. S., sec. 5562. See 10 O. S. 489.

⁵ *Bank v. Nash*, 1 Handy, 153.

⁶ *Constable v. White*, 1 Handy, 45.

⁷ *Gann v. White*, 28 O. S. 192.

⁸ *Kizer v. George*, 19 W. L. B. 257;

Timmons v. Garrison, 4 Humph. 148;

Powell v. McKee, 4 La. Ann. 108;

Deyo v. Jenison, 4 Allen, 410; *Drake*

on Attach., secs. 198-239; 1 *Wade on*

Attach. 180; *Waples on Attach.* 180.

⁹ *Langdon v. Conklin*, 10 O. S. 439;

Emerson v. Love, 2 W. L. B. 480.

¹⁰ Penn. R. R. Co. v. Peoples, *supra*;

ante, sec. 258.

with the concurrence of the plaintiff, a motion to discharge the garnishee will be granted.¹

Motions to discharge attachments may be heard upon affidavits or papers and evidence in the case, and opposed by the plaintiff in the same manner;² and the same should be filed so as to give the opposite party sufficient time to inspect the same before the hearing.³ The court must consider the whole evidence, and, no matter how poorly the cause or grounds are set out, sustain the attachment if sufficient evidence appear.⁴ The questions, however, to be considered are not the nature or justice of the claim, but does the evidence entitle the plaintiff to the process.⁵ An order discharging an attachment is not such as will prevent the issuance of a subsequent attachment.⁶

Sec. 264. Judgment for plaintiff and proceedings thereunder.—When judgment is rendered for the plaintiff it is satisfied in the same manner and under the same restrictions and regulations as if the property were levied on by execution;⁷ and the court may compel delivery of any attached property for which an undertaking has been given, or proceed summarily on such undertaking by rules of attachment as in contempt,⁸ or order an officer to repossess himself of the attached property for the purpose of selling it, and in such cases may take the property as under an order of attachment.⁹ If property attached be claimed by any person other than the defendant, an officer may have the validity of such claim tried in the same manner as if it had been seized upon execution and claimed by a third person.¹⁰

Sec. 265. Proceedings not terminated by death of defendant.—The proceedings shall be carried on even though the defendant, being a person, die after the issue of the order, or, being a corporation, its charter expire or be forfeited; in all such cases other than where the defendant was a foreign cor-

¹ *Buchanan v. Mitchell*, 8 W. L. B. 8.

² R. S., sec. 5563; *Alexander v. Brown*, 2 Disn. 395.

³ *Coaston v. Paige*, 9 O. S. 397-9.

⁴ *Sellew v. Chrisfield*, 1 Handy, 86, 90.

⁵ *Alexander v. Brown*, 2 Disn. 395.

⁶ *Brooks v. Todd*, 1 Handy, 169-76.

⁷ R. S., sec. 5555.

⁸ R. S., sec. 5556.

⁹ R. S., sec. 5557.

¹⁰ R. S., sec. 5558.

poration, the legal representatives of the defendant shall be made parties to the action.¹

Sec. 266. Error from attachment proceedings.— An order discharging an attachment upon a motion therefor is an order affecting a substantial right, although made in a special proceeding called a provisional remedy, upon which proceedings in error may be predicated and the order reversed pending the action in which the order of attachment is made.² In reversing an inferior court on a question of fact involved in the motion to discharge, a court of error should be clearly satisfied that it was error;³ but it is not necessary that a motion for a new trial shall have been made in order that a review may be had of a judgment granting a motion to discharge an attachment.⁴ A reversal may be had where a motion was made on the ground that the affidavit was insufficient;⁵ but an order of a justice of the peace cannot be reviewed by the supreme court on the ground that it was against the weight of evidence,⁶ but may for other errors;⁷ and for that purpose a bill of exceptions may be taken embodying all of the evidence upon the hearing of the motion together with the rulings of the justice.⁸ It is competent for the common pleas and circuit courts to review the order of the justice on error and reverse if not sustained by the evidence.⁹

Sec. 267. Motion to sell perishable property, or because of expense of keeping.—

[*Caption.*]

The plaintiff represents to the court that upon the writ of attachment issued herein there was levied upon, with other property, the following described personal property, to wit: [*describe it*], of the value of — dollars.

That said property is of perishable nature, and will soon decay and rot, so as to greatly, if not wholly, lose its market value, to the loss of both the plaintiff and the defendant.

[*Or*, That the keeping of said property is expensive, costing now about — dollars per day (*or*, week), and to keep it until this cause is determined will inflict a loss upon both the plaintiff and the defendant.]

Wherefore he moves that the court will order the sheriff of — county, to whom said writ was issued, and who made

¹ R. S., sec. 5560.

⁴ Burtman v. McKenzie, 12 W. L.

² Watson v. Sullivan, 5 O. S. 43 B. 321.

(1855). *Contra*, Sutliff v. Bank, 1 W.

⁵ Ganns v. Thompson, 11 O. S. 579.

L. M. 214.

⁶ Baer v. Otto, 34 O. S. 11.

³ Harrison v. King, 9 O. S. 388;

⁷ Young v. Gerdes, 43 O. S. 102.

Saxton v. Plymire, 3 O. C. C. 209.

⁸ Seville v. Wagoner, 46 O. S. 52.

⁹ Hoyman v. Beverstock, 8 O. C. C. 473.

said levy, and who still has possession of said property, to sell the same at public auction, upon reasonable notice first given, either for cash or upon such terms of credit as the court may deem proper.

[*Or*, Wherefore plaintiff, for good cause shown, moves the court for an order of sale of the aforesaid property at private sale.]

NOTE.—Sec. 5554. This motion may be made during pendency of proceedings in error to the court in which the action was brought and the property attached. It is collateral to and independent of the merits of the suit, and not within the jurisdiction of the reviewing court. *Brundred v. Rice*, 21 W. L. B. 418.

Sec. 268. Answer of defendant.—

[*Caption.*]

Defendant says that he denies each and every allegation contained in the complaint and each and every allegation contained in the affidavit filed herein for a writ of attachment.

[*Or*, That he denies each and every allegation of the affidavit filed herein for a writ of attachment.]

CHAPTER 19.

ATTORNEYS AT LAW.

Sec. 269. Petition against attorney
for negligently conduct-
ing a trial.

270. Petition for negligently de-
fending an action.

Sec. 271. Petition against attorney
for negligently investi-
gating title for the pur-
pose of a loan.

272. Petition against attorney
for negligence in examin-
ing title for purchase.

Sec. 269. Petition against attorney for negligently conducting a trial.—

[*Caption.*]

That before and at the time of the committing of the griev-
ances by the said defendant as hereinafter mentioned, the
said plaintiff, at the special instance and request of the said
defendant, had retained and employed the said defendant as
an attorney to prosecute and conduct a certain action for the
conversion of personal property in the said court, by and at
the suit of the said plaintiff, against one E. F., for taking
away and converting to his use certain goods and chattels,
claimed by him, for certain reasonable fees and reward, to
be therefor paid by said plaintiff to said defendant; and
the said defendant then and there accepted and entered upon
such retainer and employment, to wit, at —, and thereupon
it then and there became and was the duty of the said de-
fendant to prosecute and conduct the said action in a proper,
skilful and diligent manner.

That the said defendant, not regarding such his duty or re-
tainer and employment [and intending to injure and aggrieve
the said plaintiff] in this behalf, did not prosecute or con-
duct the said action in a proper, skilful or diligent manner,
and, on the contrary thereof, prosecuted and conducted the
same action to trial so improperly, unskilfully and negli-
gently [*state particular negligence*] that the said plaintiff, by
the neglect and default of the said defendant in that behalf,
was hindered and prevented from [*state result of negligence
and injury caused*], and by reason thereof was afterwards,
to wit, on, etc. [*day of nonsuit or about it*], at, etc., compelled
to suffer himself, the said plaintiff, to be nonsuited in the said
action, whereby he, the said plaintiff, was not only hindered

and prevented from recovering his said damages from the said E. F. by reason of his taking away and converting the said goods and chattels as aforesaid, but has also been forced and obliged to pay and has paid to the said E. F. a large sum of money, to wit, the sum of — dollars, for his costs and charges in and about the defense of the said action, and has also paid to said defendant another large sum of money, to wit, the sum of — dollars, for his costs and charges for the prosecution and conduct of the said action.

Wherefore, etc. [*prayer for judgment*].

NOTE—An attorney is not liable where the negligence complained of does not work any injury. *Harter v. Morris*, 18 O. S. 492. As to liability for negligence in conduct of cases, see *Weeks on Att'ys*, sec. 297.

Sec. 270. Petition for negligently defending an action.—

[*Caption.*]

At the time of the making of the promise and undertaking of said defendant, hereinafter mentioned, a certain action had been commenced and prosecuted and was then depending by and at the suit of one J. K. against the said plaintiff, in the — court of —, for the recovery of — dollars claimed to be due and owing to said J. K. from said plaintiff upon a promissory note executed by the plaintiff to said J. K. on the — day of —, 18—, for — dollars, and thereupon he employed and retained the said defendant, he being then an attorney [of the said court], as such attorney to defend the said action for the said plaintiff, and in consideration of such employment the said defendant undertook and then and there faithfully promised the said plaintiff to defend the said action for him, the said plaintiff, in a proper and careful manner. Plaintiff informed the defendant that he had fully paid said note before suit was brought thereon, and although such proceedings were thereupon had in the said action that afterwards, to wit, on the — day of —, 18—, it became and was the duty of the said defendant, under and by virtue of his said retainer and his said promise and undertaking, to file a proper and sufficient answer to the petition therein, nevertheless the said defendant, not regarding his said promise and undertaking [but contriving to injure the said plaintiff in this behalf], did not nor would, when it was his duty so to do as aforesaid, file a proper or sufficient answer to the said petition, but, on the contrary thereof, wholly omitted and neglected so to do, and by reason thereof, and by and through the default and neglect of the said defendant in that behalf, afterwards, to wit, on the — day of —, 18—, judgment by default was obtained in the said action against him, the said plaintiff, by which it was adjudged, in and by the said court, in the said action, that the said J. K. should recover against the said plaintiff a large sum of money, to wit, the

sum of — dollars; and the said plaintiff was afterwards, to wit, on the — day of —, 18—, forced and obliged to pay, and did pay, to the said J. K. the said sum of money so recovered by him as aforesaid; and also by means of the premises he, the said plaintiff, was put to divers costs and charges in and about his endeavoring to defend the said action, amounting in the whole to a large sum of money, to wit, — dollars, and has lost and been deprived of the means of recovering the same from the said J. K.

Wherefore, etc.

NOTE.— The judgment cannot be enjoined because the attorney neglects to defend a suit, but the remedy is against the attorney for damages. *Barhorst v. Armstrong*, 42 Fed. Rep. 2.

Sec. 271. Petition against attorney for negligence in investigating title for the purpose of a loan.—

[*Caption.*]

That heretofore, and on or about the — day of —, 18—, one H. O. was desirous of obtaining from the said plaintiff a loan of — dollars, upon interest, at and after the rate of six per cent. per annum, and as a security for the repayment therefor, and interest thereupon as aforesaid, to the said plaintiff, proposed to incumber certain lands, tenements and premises situated in the county of — and state of —.

That the plaintiff thereupon, to wit, on the day and year aforesaid, employed and retained the said defendant as an attorney, for fees and reward to him in that behalf, to ascertain the title of the said H. O. to the said lands and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money and interest, and the said defendant accepted and entered upon such retainer and employment.

That the said defendant, not regarding his duty or his said retainer and employment [but contriving and intending to injure and aggrieve the plaintiff in this behalf], did not take due and proper care to ascertain the title of the said H. O. to the said lands, tenements and premises, nor take due and proper care that the same should be a sufficient security for the repayment of the said sum and interest.

And the said plaintiff further says that he, confiding in the said performance of the said duty of the said defendant, and relying upon the statement and assurance of the said defendant theretofore made to this plaintiff to the effect that the said H. O. had a valid title in fee-simple to and in said premises, afterward, to wit, on the — day of —, 18—, did lend and advance to the said H. O. the sum of — dollars, upon the security of certain lands, tenements and premises in the county of — aforesaid, as and for a sufficient security in that behalf; and the said defendant, in pursuance of his said

retainer, caused to be prepared and executed a certain mortgage and certain securities relating to the said supposed interest of the said H. C. in the said last-mentioned lands, tenements and premises, as and for such sufficient security for the repayment of the said sum of — dollars, and interest as aforesaid, the same being then and there, by reason of the said defendant's negligence, carelessness, unskilfulness and improper conduct in the premises, a bad and insufficient security for the repayment of the said sum of — dollars and interest as aforesaid, whereby the plaintiff lost the amount so loaned to the said H. C., to his damage in the sum of — dollars, for which, etc. [*prayer for judgment*].

Sec. 271a. Petition against attorney for negligence in examining title for purchase.—

[*Caption.*]

That at a time hereinafter mentioned the plaintiff entered into a contract with one L. M. for the purchase from him of certain real property [*describing the premises*] for the sum of — dollars, which property said L. M. assumed to have power to convey in fee, and clear of all incumbrances.

That the defendant was an attorney and was employed by the plaintiff as such at —, in the month of —, 18—, to examine the title of L. M. to said property, and to ascertain if the title was good and if any incumbrances existed thereon, and to cause and procure an estate therein in fee-simple and clear of all incumbrances to be conveyed to the plaintiff, which the defendant for compensation agreed to do.

That the defendant negligently and unskilfully conducted such examination, and did not use endeavors to cause or procure a good and sufficient title in fee, clear of incumbrances, to be conveyed to the plaintiff, but wrongfully advised and induced the plaintiff to pay said L. M. the sum of — dollars, being said purchase-money of the premises, when in fact said L. M. had no title thereto [*or, when said property was subject to incumbrances, specifying them and amount*, and the plaintiff, in order to release the premises from said incumbrances, was obliged to pay the holders thereof the sum of — dollars], to the damage of the plaintiff — dollars.

NOTE.—As to liability for attorney for negligence in examining title, see Weeks on Att'ys, secs. 804, 812.

CHAPTER 20.

BAILMENTS.

Sec. 272. General form of petition against bailee for negligence.	Sec. 276. Duties and liabilities of pledgee.
273. Petition for damages against bailee for negligence in special case.	277. Petition for damages for loss of pledge.
274. Petition for damages against hirer of horse and buggy for carelessness.	278. Petition to foreclose and sell pledge.
275. Petition for damages arising from driving horse to different place than that agreed upon.	279. Answer of loss by fire.
	280. Pledge of commercial paper.
	280a. Petition by pledgor of negotiable paper against pledgee.

Sec. 272. General form of petition against bailee for negligence.—

[*Caption.*]

That the said plaintiff heretofore, and on or about the — day of —, 18—, at —, at the special instance and request of the said defendant, caused to be delivered to him, the said defendant, a certain [*name property*] belonging to said plaintiff, of the value of — dollars, to be taken care of and safely and securely kept by the said defendant for the said plaintiff. Said defendant thereupon undertook and agreed with the said plaintiff to take due and proper care of the said [*property named*] for said plaintiff, and to deliver the same to him, the said plaintiff, to wit, at —; yet the said defendant, not regarding his duty in that behalf, did not, nor would, take due and proper care of the said [*property*] for the said plaintiff; nor did he when requested as aforesaid, or at any time before or afterwards, redeliver the same to the said plaintiff; but, on the contrary, said defendant so carelessly behaved and conducted himself with respect to the said [*property*], and took so little and such bad care thereof, that by and through the carelessness, negligence and improper conduct of the said defendant the said [*property*] became and was wholly lost to the said plaintiff, to the damage of the plaintiff of — dollars.

GENERAL NOTE— A bailee without reward is liable only for losses arising from gross negligence, and hence whether a banking house has been guilty

of negligence when bonds have been deposited with it as a gratuitous bailee must be determined by the jury; he should keep the goods intrusted to him as he would ordinarily keep goods of his own of the same kind. *Griffith v. Zippenwick*, 28 O. S. 388. A bailee who as a guest has intrusted a trust fund in his possession with a hotel may maintain an action in his own name for the recovery of the same when lost while in the custody of such hotel. *Arcade Hotel Co. v. Wiatt*, 1 O. C. C. 55. A bank receiving special deposits gratuitously is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value. *Bank v. Zent*, 89 O. S. 105. A bailor has a remedy against a person who has converted his property to his own use. *Thorne v. Bank*, 87 O. S. 260; *Roland v. Gundy*, 5 O. 202; *Knapp v. Hobbs*, 50 N. H. 476. But where a bailee sells property of a bailor in violation of his trust, and applies the proceeds in payment of the former's debts to a third person ignorant of the breach of trust, the latter cannot maintain an action for money had and received against such third person. *Thorne v. Bank*, 87 O. S. 260, 261; *Kingsley v. Plimpton*, 17 Pick. 159; *Thatcher v. Pray*, 118 Mass. 391; *Culver v. Bigelow*, 48 Vt. 242.

Sec. 273. Petition for damages against bailee for negligence in special case.—

That on the — day of —, 18—, the defendant, being a [*describe trade*], and carrying on that trade, the plaintiff, at the defendant's request, delivered to defendant [*describe property*], the property of plaintiff, of the value of \$—, to be repaired by said defendant in the way of his trade, for a reasonable reward to be paid by the plaintiff.

That the defendant thereupon promised the plaintiff to repair said — in a skilful and workmanlike manner, and to take due and proper care thereof until the same should be returned by the defendant to the plaintiff.

That the said defendant did not repair said — in a good and workmanlike manner, and neglected to take proper care of said —, whereby said property was greatly injured, and the value of the same diminished in the sum of \$—, to the damage of plaintiff in the sum of \$—.

[*Prayer.*]

Sec. 274. Petition for damages against hirer of horse and buggy for carelessness.—

[*Caption.*]

That on the — day of —, 18—, for a valuable consideration, the plaintiff, at defendant's request, let to defendant a certain horse, the property of plaintiff, of the value of \$—, for the purpose of going from — to —, and return.

It thereby became the duty of defendant, and he promised at the time of hiring said horse, to take proper care thereof, which was the condition upon which said defendant received said horse.

Defendant failed and neglected to use said horse in a careful, prudent manner, but, on the contrary, rode [*or, drove*] the same immoderately upon said journey, and failed and neglected properly to care for the same, whereby said horse

[*state the injury*], to the damage of plaintiff in the sum of \$—.

[*Prayer.*]

NOTE— Liability for overdriving, see *Bonfield v. Whipple*, 10 Allen, 27; *Edwards v. Carr*, 18 Gray, 234; *Ray v. Tubbs*, 50 Vt. 688; *Rowland v. Jones*, 78 N. C. 52; for overloading, *McNeil v. Brooks*, 1 Yerg. 78; *Harrington v. Snyder*, 3 Barb. 880; for careless hitching, *Jackson v. Robinson*, 18 B. Mon. 1; for carelessness in feeding, *Handford v. Palmer*, 2 B. & B. 359; *Eastman v. Sanborn*, 3 Allen, 594; *Cross v. Brown*, 41 N. H. 288.

Sec. 275. Petition for damages arising from driving horse to a different place from that agreed upon.—

[*Caption and opening.*]

That on the — day of —, 18—, the defendant hired from the plaintiff a horse and wagon, the property of the plaintiff, of the value of \$—, for the purpose of driving from — to —.

Defendant, disregarding his said agreement, drove said horse and wagon to — without authority from plaintiff.

Defendant so negligently drove and fed said horse that the same, by reason of said defendant's negligence and violation of his said contract, became sick and died.

That said horse was reasonably worth the sum of \$—, and plaintiff has therefore, by reason of the premises, been damaged in the sum of \$—, for which he asks judgment.

NOTE— Liability of person for driving horse to different place. *Buchanan v. Smith*, 10 Hun, 474; *Fisher v. Kyle*, 27 Mich. 454; *Wentworth v. McDuffe*, 48 N. H. 402; *Lane v. Cameron*, 38 Wis. 608; *Ray v. Tubbs*, 50 Vt. 688; *Lucas v. Trumbull*, 15 Gray, 306. If infant. *Homer v. Thwing*, 3 Pick. 492.

Sec. 276. Duties and liabilities of pledgee.— It is the duty of a pledgee to safely keep the thing hypothecated that it may be returned when the pledgor has complied with all the requirements and conditions of the loan.¹ So where property pledged has been disposed of in violation of the contract, or the pledgee refuses to deliver the same to the pledgor upon the latter's compliance with all conditions, suit may be maintained against the pledgee for conversion.² It does not amount to a conversion where the pledgee has sold the property by virtue of the power given him for that purpose.³ The pledgee is required to use ordinary care with respect to the thing

¹ *Dodge v. Meyer*, 61 Cal. 405; *Rosenzweig v. Frazer*, 82 Ind. 842; *worth v. Bowen*, 9 Wis. 848; *Dodge v. Meyer, supra*; *Rosenzweig v. Luckey v. Gannon*, 1 Sweeney, 12. *Frazer, supra*.

² *Luckey v. Gannon, supra*; *Ainsworth v. Dalziel*, 18 Ill. App. 23.

pledged and is liable for ordinary negligence.¹ And if the article pledged be lost the pledgee will only be liable when guilty of negligence.² The holder of stock in pledge as collateral for its owner's debt is an agent for the latter, or coupled with an interest, and must account to the owner for all surplus arising upon sale.³

Sec. 277. Petition for damages for loss of pledge.—

[*Caption and opening.*]

On the — day of —, 18—, the plaintiff delivered to the defendant, at his request, the following goods: [*describe goods*], the property of the plaintiff, and of the value of \$—, by way of pledge to said defendant for the sum of \$—, then and there advanced by the defendant to the plaintiff thereon.

The defendant at the time of receiving said goods agreed to exercise proper care for the same until plaintiff was able to pay the amount loaned thereon, and redeem the same.

Plaintiff wholly failed and neglected to take proper care of said goods, by reason whereof the same were entirely destroyed and ruined and lost to plaintiff.

Plaintiff tendered to the defendant, on the — day of —, 18—, the sum of \$—, the sum so by him advanced and loaned upon said goods, and demanded the return of the same; which was refused. That by reason of the non-delivery of said goods by the defendant, plaintiff has been damaged in the sum of \$—, etc.

Sec. 278. Petition to foreclose and sell pledge.—

[*Caption.*]

Plaintiff alleges that on the — day of —, 18—, he loaned to the defendant the sum of \$— for — months, with interest at the rate of — per cent.

At the time of making said loan, and in order to secure the payment of said sum of \$—, defendant delivered to plaintiff by way of pledge the following property: [*Describe property.*] Said property was received by plaintiff to be by him sold in case said defendant failed to repay said sum so loaned to him in accordance with the terms of said loan, and the proceeds thereof applied to the payment of said loan.

That the defendant failed and neglected to pay said sum of

¹ *St. Losky v. Davidson*, 6 Cal. 643; *Arent v. Squires*, 1 Daly, 347; *Bank v. Jackson*, 67 Me. 570.

² *Abbett. v. Frederick*, 56 How. Pr. 68; *Van Nostran v. Guaranty Co.*, 7 J. & S. 73; *Bank v. Zent*, 89 O. S. 105.

³ *Lee v. Bank*, 2 C. S. C. R. 300. As to action by pledgee of stock upon refusal to transfer the same for the value thereof, see *Bank v. Bank*, 87 O. S. 208.

§— at the time the same became due, and there is now due plaintiff from defendant thereon the sum of §—.

Wherefore plaintiff asks judgment against the defendant for the sum of §—, and that the said property so as afore-said pledged may be sold and the proceeds thereof applied in payment of the amount so found due plaintiff.

NOTE.— The pledgee has the right either to obtain a decree for the sale of a pledge, or may make a valid sale without. *Briggs v. Oliver*, 68 N. Y. 334; *Lucket v. Townsend*, 49 Am. Dec. 723; *Robinson v. Hurly*, 11 Iowa, 410; *Boynton v. Payrow*, 87 Me. 587. See, also, *Stearns v. Marsh*, 4 Denio, 227; *Strong v. National Bank Association*, 45 N. Y. 718; *Conynham's Appeal*, 57 Pa. St. 474.

Sec. 279. Answer of loss by fire.—

[*Caption.*]

Defendant admits that he received from the plaintiff the goods described in the petition, to be kept for him, and delivered on demand, but alleges that he stored them in his warehouse at —, and kept them until the — day of —, 18—, when said warehouse, with its contents, including the property of the plaintiff, without the fault or neglect of defendant, was destroyed by fire.

[*Or*, That plaintiff has not at any time demanded said property from defendant.]

[*Prayer.*]

Sec. 280. Pledge of commercial paper.— A different rule prevails as to commercial paper pledged as collateral security.¹ Such a pledge, in the absence of special power to that effect, does not authorize the pledgee to sell the same either at public or private sale, but he must hold and collect the same as it becomes due and apply the proceeds to the payment of the debt. This exception is made because of the impracticability of selling commercial paper.² An indorser and indorsee of commercial paper pledged as collateral security are regarded as sustaining the relation of pledgor and pledgee, and it becomes the duty of the pledgee in such case to use ordinary care and diligence in the collection thereof if maturing before the date for which it is pledged.³ A pledgee of commercial

¹ *Ante*, sec. 276.

N. J. Eq. 828; *Iron and Steel Co. v.*

² *Handy v. Sibley*, 46 O. S. 15; *Brick Co.*, 82 Ill. 548; *Zimpleman v. Moore v. Hamaunn*, 19 W. L. B. 388; *Veeder*, 98 Ill. 618. The utmost good *Wheeler v. Newbold*, 16 N. Y. 392; faith is required of the pledgee in *Fletcher v. Dickinson*, 7 Allen, 28; such cases. 46 O. S. 15.

Nelson v. Wellington, 5 Bosw. 178; ³ *Bridge Co. v. Saving Bank*, 46 *Morris Canal & B. Co. v. Lewis*, 12 O. S. 224; *Roberts v. Thompson*, 14

paper may bring suit thereon when it becomes due whether the indebtedness for which it was pledged be paid or not,¹ and such suit may be brought even though the debt secured is not due.² It is not necessary in such suits to either make or allege a demand upon the pledgor.³ The pledgee may collect the whole amount of a note hypothecated, even though the debt for which the note is given as security be less than the note itself, and must return the surplus.⁴ Collateral notes should be held until due, and if sold before due to a *bona fide* purchaser their full value must be credited to the debt.⁵ While it is the duty of the pledgee to collect collaterals whenever the same become due, still he is not allowed to apply the proceeds to the payment of the debt secured until after default in its payment.⁶ A person receiving collateral security is bound to use ordinary care in collecting it, and is liable for any loss which may happen to the other for any want of care or diligence, the rights and duties of such parties being governed by the law of agency. But where demand and notice is waived by a debtor assigning collaterals to his creditors, the latter are not bound to demand and insist on payment of the security before maturity; the assignment being an absolute guaranty of payment, the plaintiff is thereby relieved of all obligation to demand payment when the note matured.⁷

Sec. 280a. Petition by pledgor of negotiable paper against pledgee.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, he was indebted to the said defendant in the sum of — dollars, and in order to secure the said defendant upon such indebtedness he delivered to him as collateral security for the payment of said indebtedness a warrant promissory note made by one A. B. for the sum of — dollars, said note bearing date of —, 18—, and payable within — days after date; that upon

O. S. 1; *Reeves v. Plow*, 41 Ind. 204; 7 Wis. 492. Attorney's fees cannot be recovered. *Bank v. Hemingray*, 84 O. S. 381.

¹ *McCarty v. Clark*, 10 Iowa, 588.

² *Jones v. Hawkins*, 17 Ind. 550.

³ *Paine v. Furnas*, 117 Mass. 290;

Nelson v. Edwards, 40 Barb. 279.

⁴ *Atlas Bank v. Doyle*, 9 R. I. 70; 11 Am. Rep. 219; *Hilton v. Warren*,

⁵ *Roake v. Bonte*, 9 Am. Law Rec. 487; *Springer v. Purcell*, 5 W. L. B. 889.

⁶ 15 J. & S. 409; *Farwell v. Bank*, 90 N. Y. 483; 73 N. Y. 269; 29 Am. Rep. 142.

⁷ *Roberts v. Thompson*, 14 O. S. 1.

maturity of said note the same was duly collected by the said defendant, and the proceeds therefrom were by him duly applied upon the said indebtedness due him from this plaintiff, whereby the same was wholly paid and extinguished; and that after payment thereof there remained in the hands of said defendant, arising from the proceeds of the said note so pledged as collateral, a balance of — dollars belonging to this plaintiff. Said plaintiff demanded payment of said sum of — dollars from the defendant, which was refused, and no part thereof has been paid.

Wherefore he asks judgment against the said defendant for the sum of — dollars.

CHAPTER 21.

BANKS AND BANK CHECKS.

<p>Sec. 281. Some powers of banks.</p> <p>282. Relative rights of bank and depositor.</p> <p>283. Payments by bank.</p> <p>284. Duties and liabilities of bank in making collections.</p> <p>285. Right of set-off between bank and depositor.</p> <p>286. Petition against bank for damages for neglect in collecting note or bill.</p> <p>287. Petition by one bank against another for failure to protest note sent in for collection, loss occurring through insolvency of</p>	<p>makers and release of indorser.</p> <p>Sec. 288. Petition for recovery on lost certificate of deposit against bank before due.</p> <p>289. Legal status of checks.</p> <p>290. Petition of payee against drawer of check.</p> <p>291. Petition by indorsee against drawer.</p> <p>292. Petition of drawer against drawee.</p> <p>293. Certified checks and form of petition.</p> <p>294. Answer that certified check was a forgery.</p>
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Sec. 281. Some powers of banks.—The expression, “an association with banking powers,” as used in the constitution, or “banking institutions or banks,” means those authorized to issue bills or notes.¹ Discounting paper by a bank is only a method of loaning money, and it is thus authorized to acquire notes and bills which are perfect and available in the hands of a borrower, as well as his own paper made directly to the bank;² and the rights and liabilities of parties growing out of their transactions with a national bank in loaning money and charging interest thereon, and actions between them, are prescribed by the national bank act and are not controlled by state legislation.³ They are not permitted to take or charge

¹ Dearborn v. Northwestern Sav. Bank, 42 O. S. 617; O. L. & T. Co. v. Debolt, 16 How. 438; Bank v. Hines, 3 O. S. 1-31; Corwin v. U. & C. M. L. Co., 14 Ohio, 6; Bates v. S. & L. Ass'n, 42 O. S. 655.

² Smith v. Bank, 26 O. S. 141; Niagara Bank v. Baker, 15 O. S. 69; Fletcher v. Bank, 8 Wheat. 333.

³ Higley v. Bank, 26 O. S. 75.

a rate of interest greater than is allowed by the laws of the state in which they are situated, and a bank so charging usurious interest forfeits all the interest due upon a note.¹ Although authorized to take mortgages on real estate to secure debts, yet where a bank grants an extension of the time of payment of such indebtedness at a usurious rate of interest, taking therefor notes and mortgages, the usury avoids only the interest; and the notes and mortgages are *bona fide* security to the extent that the debt is valid.²

A bank may agree to collect commercial paper and take the proper steps to charge the indorsers gratuitously, and it will not be *ultra vires* so to do. If under such circumstances it neglects to protest a note, it is liable upon its contract, although there was no consideration, and the owner relied only on the voluntary undertaking.³ A certificate of deposit given by a bank for a loan of money is not such a note as it is prohibited from issuing, as it is not intended to circulate as money, but represents only the indebtedness to the depositor for a loan.⁴

The principles of agency are applicable to banks, they being liable for acts of officers the same as other corporations and individuals, and cannot, therefore, show either abuse or disregard of authority by one of them, nor fraud or bad faith as a defense to an action against it by an innocent party.⁵

Sec. 282. Relative rights of bank and depositor.—When a banker opens an account with his customer and receives a deposit, there is an implied agreement that the former will hold the fund subject to his order, and money so received on general deposit becomes the property of the bank, and the relation subsisting between the depositor and bank is that of creditor and debtor, not of bailee or trustee for the money.⁶ It does not agree to pay checks out of any particular fund,

¹ *Shunk v. Bank*, 22 O. S. 508; *Hade* 511; *Frankfort Bank v. Johnson*, 24 Me. 490; *Farmers' & M. Bank v. Bank*, 16 N. Y. 133.

² *Allen v. Bank*, 28 O. S. 97.

³ *White v. Bank*, 4 W. L. B. 791.

⁴ *Logan Nat. Bank v. Williamson*, 2 O. C. C. 118.

⁵ *Bank v. Blakesley*, 42 O. S. 645.

See *Merchants' Bank v. Bank*, 10 Wall. 604; *Thayer v. Bussen*, 19 Pick.

⁶ *Bank v. Brewing Co.*, 50 O. S. 151; *McGregor v. Loomis*, 1 Disn. 247; *Coverts v. Rhodes*, 48 O. S. 71; *Bolles on Banks and Banking*, sec. 84.

Sometimes the relation is fiduciary. *Id.*

and does not retain any specific fund for that purpose, the funds of the depositor becoming merely a part of the general funds of the bank. The bank not only gives the right to the depositor to draw on the deposit, but promises that all drafts will be paid on presentation, and that all checks will be accepted, thus agreeing in advance to honor drafts and checks, furnishing a strong analogy to the rule which binds the drawee of a bill as acceptor.¹ A check, therefore, drawn upon the money of a depositor operates as an assignment *pro tanto* only when accepted by the bank, and if the former be indebted to the latter upon past-due paper at the time the check is drawn, the bank may refuse payment thereof and apply so much of the deposit as may be required for the payment of the notes.² A bank may apply money on general deposit on debt due from depositor.³ A bank has a lien also on the proceeds of a draft deposited with it for collection, and may apply the same against any balance due it by a depositor, and may retain all proceeds collected as against an assignee for creditors of a depositor; but this rule will not be applicable to drafts which are not collected, or that may be collected subsequent to an assignment;⁴ but if a depositor be only a surety for a debt, such an application cannot be made without the depositor's consent.⁵

Considerable conflict prevails on the question as to the effect of a check drawn for only a portion of a fund, many courts holding that it will operate as an equitable assignment of so much of the fund as may be stated in the check;⁶ but in Ohio, where the idea that a fund of a depositor is held in trust is entirely repudiated, a check unaccepted by a bank for a part of the fund will not operate as an assignment of such fund; and if the drawer thereof makes an assignment before

¹ *McGregor v. Loomis*, *supra*; 9 Mass. 55; 2 Met. 53.

² *Bank v. Brewing Co.*, 29 W. L. R. 294; 50 O. S. 151.

³ *Second Nat. Bank v. Hill*, 76 Ind. 223; *Scott v. Shirk*, 60 Ind. 160; *Comb v. Morris*, 118 Ind. 179; *Com'l Nat. Bank v. Henniger*, 105 Pa. St. 496; *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298.

⁴ *Hackman v. Schaf*, 5 W. L. R. 851.

⁵ *Lamb v. Morris*, 118 Ind. 179; *Bedford Bank v. Acoam*, 125 Ind. 584.

⁶ *Voorhes v. Heskett*, 1 O. C. C. 1. See *McGregor v. Loomis*, 1 Disn. 247; *Bank v. Hemingray*, 1 C. S. C. R. 435; *Stewart v. Smith*, 17 O. S. 82; *Andrew v. Blachly*, 11 O. S. 89; *Morrison v. Bailey*, 5 O. S. 13; 25 Ill. 35; 68 Ill. 398; 80 Ill. 212; 8 Bush, 357; 26 Ia. 315.

the same is presented for payment, and notice of such assignment reaches the bank, the fund deposited belongs to the assignee.¹

A different rule applies when a check is drawn for the whole of a fund than when drawn for only a portion, in which case it will be considered a sufficient designation of the specific fund to operate as an assignment. This distinction is made by many well-considered cases.² Where a bank receives a check drawn upon a depositor's account, and later on the same day receives a draft upon the same account, which is duly credited thereon, it operates as an acceptance of the draft, and the bank becomes liable on the check which is waiting payment as soon as the draft is credited upon the payor's account.³ A bank is bound to pay the checks of a depositor who has an account in his own name as agent even though it receives notice from another person that the account is his; and if it arbitrarily refuses to pay is liable in damages even though no special damages are shown.⁴ Where paper is pledged as collateral with a bank for a sum larger than a loan made by it to the owner of such paper, the bank does not acquire a lien upon the residue thereof so as to appropriate the same to the payment of another note indorsed to such party by the bank before the pledge of the collateral.⁵ If a bank discounts a draft and passes the same to the credit of a drawer, allowing him to check against it, it becomes a *bona fide* holder thereof for value, and is protected against any equities between the original parties.⁶ Money received

¹ *Covert v. Rhodes*, 48 O. S. 66; *McComber v. Dome*, 2 Allen, 541; *Bank v. Brewing Co.*, 50 O. S. 151. *Gibson v. Clark*, 20 Pick. 10; *Lewis v. Bank*, 80 Minn. 134; *Jones v. Wood Co.*, 18 Nev. 359; *Rosenthal v. Bank*, 17 Blatch. 818; *Dolsin v. Brown*, 18 La. Ann. 351; *Sands v. Matthews*, 27 Ala. 399.

² *Northern Bank of Ky. v. Merchants' Bank*, 28 W. L. B. 120.

³ *Patterson v. Nat. Bank*, 23 W. L. B. 269 (Pa.); 47 Ph. Leg. Int. 118.

⁴ *Stowe v. Bank*, 1 O. C. C. 524.

⁵ *First Nat. Bank v. Crawford*, 2 C. S. C. R. 125.

⁶ *Gardner v. Nat. City Bank*, 39 O. S. 600; *Moore v. Davis*, 57 Mich. 251; *Bank v. Railway*, 53 Iowa, 378; *Mandeville v. Welch*, 5 Wheat. 77; *Kingman v. Perkins*, 105 Mass. 111;

¹ *Covert v. Rhodes*, 48 O. S. 66; *McComber v. Dome*, 2 Allen, 541; *Bank v. Brewing Co.*, 50 O. S. 151. *Gibson v. Clark*, 20 Pick. 10; *Lewis v. Bank*, 80 Minn. 134; *Jones v. Wood Co.*, 18 Nev. 359; *Rosenthal v. Bank*, 17 Blatch. 818; *Dolsin v. Brown*, 18 La. Ann. 351; *Sands v. Matthews*, 27 Ala. 399.

² *Northern Bank of Ky. v. Merchants' Bank*, 28 W. L. B. 120.

³ *Patterson v. Nat. Bank*, 23 W. L. B. 269 (Pa.); 47 Ph. Leg. Int. 118.

⁴ *Stowe v. Bank*, 1 O. C. C. 524.

⁵ *First Nat. Bank v. Crawford*, 2 C. S. C. R. 125.

⁶ *Gardner v. Nat. City Bank*, 39 O. S. 600; *Moore v. Davis*, 57 Mich. 251; *Bank v. Railway*, 53 Iowa, 378; *Mandeville v. Welch*, 5 Wheat. 77; *Kingman v. Perkins*, 105 Mass. 111;

by an official in his official capacity and deposited by him in his private account is personally liable therefor if the bank fails and the money is lost.¹

The statute of limitations does not begin to run against a deposit or debt until demand has been made, or unless a bank stops payment, in which event the necessity for a demand no longer exists.² A bank is liable in damages to its depositors if it refuses without just cause to honor a check drawn by the latter,³ but it is not bound to pay part of a check if it has not sufficient funds on deposit to pay the whole amount.⁴ A person depositing money in his name as agent, whose checks have been honored, may sue the bank in his own name for any balance due on account.⁵

Sec. 283. Payments by bank.— It is the duty of a bank to identify all persons who present paper for payment, and it must see to it that the payee named in the check is the proper person, that it pays according to the order to the party named therein or to one holding it under a genuine indorsement. The rightful possession of a check payable to order confers no authority on the bank to pay it to such person, and its duty to pay on a genuine indorsement is not affected by any custom of bankers; hence if it relies on a false representation as to identity, for which neither drawer nor payee is responsible, the bank is liable,⁶ and its liability cannot be affected by any act or omission of the drawer in issuing a check of which the bank has no notice.⁷ While money paid under a mistake of facts and without consideration may, as a general rule, be recovered, yet there is a well-settled exception to this rule where payment is made by a drawee of forged bills or

¹ *Shaw v. Bauman*, 34 O. S. 25; *Wren v. Kirton*, 11 Ves. 377; *In re Stafford*, 11 Barb. 353; *Brown v. Ricketts*, 4 Johns. Ch. 303; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Phillips v. Lamar*, 27 Ga. 223.

² *Armstrong v. Warner*, 21 W. L. B. 136; *Morse on Banking*, sec. 822.
³ *Whittaker v. Bank*, 6 C. & P. 700; *Marzetti v. Williams*, 1 B. & A. 415; *Watts v. Christi*, 11 Beav. 546; *Rolin v. Steward*, 14 C. B. 594.

⁴ *In re Brown*, 3 Story, 502.

⁵ *McLaughlin v. National Bank*, 43 N. W. Rep. 715.

⁶ *Dodge v. Bank*, 30 O. S. 1. See cases in next note; *Kuhn v. Frank*, 10 Am. L. Rec. 623; 7 W. L. B. 134.

⁷ *Dodge v. Bank*, 20 O. S. 234. See *Graves v. Bank*, 17 N. Y. 205; *Morgan v. Bank*, 1 Kern, 404; *Shaffer v. McKee*, 19 O. S. 526; *Vanbibber v. Bank*, 14 La. Ann. 431.

checks to a holder for value, in which event the money cannot be returned without prejudice;¹ but where there is any negligence the loss will fall upon him who is negligent; and in the absence of negligence the loss will remain where the course of business has placed it.² Where a check made payable to a drawee himself without the word "order" or "bearer," and indorsed in blank, is stolen, and is paid on presentation, the bank is protected.³ Payment made by a savings bank to the wrong person on presentation of a deposit book, the person claiming to be the depositor and giving correct answers as to the mode of deposit, will not make the bank liable where its rules require the deposit book to be presented in order to draw the money.⁴ A national bank cannot provide for the cashing of checks drawn upon it at any other place than its banking house; hence where a bank in another city has funds in its possession belonging to another bank, and has cashed checks drawn upon the latter bank under an arrangement for that purpose, the bank so cashing the checks which happen to be worthless cannot retain the money in its possession as against the receiver of the bank upon which the checks were drawn.⁵ A bank may refuse to cash a check when it has knowledge that it was given in payment of a bet made in violation of law; and if a check is so cashed the drawee cannot recover the amount from the bank.⁶

Sec. 284. Duties and liabilities of banks in making collections.— When commercial paper is indorsed to a bank for the purpose of collection, the relation of principal and agent exists between the owner of the paper and the banking company, and the latter holds the proceeds arising therefrom in trust.⁷ A correspondent selected by a bank is not a sub-agent of the owner of the note, but only the instrument through which the bank undertaking the collection assumes to perform

¹ *Ellis v. Insurance Co.*, 4 O. S. 628; only as directed. *Shipman v. Bank*, 126 N. Y. 818; 22 Am. St. Rep. 831. 333.

² *Gloucester Bank v. Bank*, 17 Mass. 33. ³ *Fidelity Bank v. Cincinnati National Bank*, 21 W. L. B. 861.

⁴ *Bowden v. Bank*, 7 W. L. B. 288. ⁵ *McCord v. Bank*, 28 W. L. B. 808; 33.

⁶ *Morse on Bank*, sec. 811.

⁷ *Gifford v. Bank*, 11 L. R. A. 794; ⁸ *Hamilton v. Cunningham*, 21 Atl. Rep. 840. Bank must pay Brock. 350.

its duty;¹ and if the bank makes an assignment its trustee cannot apply the same as a credit to the payment of a debt of the bank.²

It is a well-settled rule that when a bank has made an assignment or suspends, it cannot receive payment upon paper previously deposited for collection in such a way that it will pass into its general assets, and the owner thereof thereby placed among its general creditors and entitled only to dividends. The bank acting only as an agent, there is no reason why its general creditors should receive the benefit of such paper, if the owner can trace or ascertain his property in its substituted form.³ It is only necessary that the owner of the paper show that the bills or notes were impressed with a trust, and the latter will be required to respond either in the article taken or its value.⁴

A bank to which paper is sent by another bank for collection, in the absence of any special contract or controlling usage, is regarded as the agent of the primary agent, the first bank, and not of the owner of the paper, and is therefore liable for any neglect of duty in taking the necessary steps to charge the drawer and indorser.⁵ But where a bank in one state receives a draft for collection in another state, and forwards the same to its correspondent in the latter state, it is responsible to the owner for the conduct of its correspondent, who is regarded as its agent, and not the sub-agent of the owner of the draft, and payment to the agent is payment to the bank.⁶ This question is not free from difficulty, and must be very largely governed by the circumstances in each case. It quite frequently occurs that there is an agreement entered into by the owner of the paper and the bank that it shall be sent to a particular correspondent. In such cases the owner

¹ *Reeves v. State Bank*, 8 O. S. 465; *Story's Equity*, sec. 1228; *Bank v. Bank v. Moore*, 4 W. L. B. 291; s. c., *Bank*, 2 McCrary, 488.
8 Am. L. Rec. 97.

⁴ *Thompson v. Savings Institution*, 8 Atl. Rep. 97 (N. J., 1887).

² *Jones v. Kilbreth*, 49 O. S. 401; *Gilbert v. Sutliff*, 8 O. S. 129; *Carter v. Lepeey*, 70 Ga. 417; *Commercial Bank v. Armstrong*, 39 Fed. Rep. 684; *Levi v. Bank*, 5 Dill 109.

⁵ *Allen v. Merchants' Bank*, 22 Wend. 215.

⁶ *Reeves v. State Bank*, 8 O. S. 465 (1858); *Hermann v. Bank*, 10 O. S.

³ *Jones v. Kilbreth*, 49 O. S. 412; 446.

Morse on Banking, sec. 248a. See

of paper has as much to do with the selection of the agent as does the bank. On the other hand, there are banks who hold themselves out as collecting agencies and who have their special correspondents in various localities, and in sending paper for collection indorse the same to correspondents of their own selection, in which case it is perfectly clear that the correspondents are the agents of the bank, who must be held responsible for their acts.¹ It is the duty of a bank holding commercial paper as agent for collection, when dishonored at maturity, to take the usual and proper action required to charge indorsers, and, if the latter be discharged by any neglect in this respect, the bank is liable as agent to the owner as principal for resulting damages.² A notary in protesting a note, when the owner of paper directs or dictates the mode of fixing an indorser's liability, is the agent, not of the bank, but of the owner of the paper.³ The measure of damages in such cases is the face of the bill or note with interest.⁴ It is the duty of a bank receiving paper as collateral, which is made payable at a place designated by the parties thereto, to transmit it upon maturity to such place for collection; if the place of payment be a bank, it is the agent of the owner of the paper, and not of the bank holding it as collateral; hence the latter is not liable to the owner for any loss occurring by reason of failure on the part of the bank to which the paper is sent for collection. A bank receiving paper as collateral is bound only to ordinary care and diligence in collecting it.⁵

Paper indorsed merely "for collection" passes only so far as to enable the indorsee bank to demand, receive and sue for

¹ Commercial Bank v. Union Bank, 11 N. Y. 208; Thaber v. Perrot, 2 Gali. 565; East Haddam Bank v. Scovill, 12 Conn. 803; Fabens v. Commercial Bank, 28 Pick. 330; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459.

² Bank v. Bank, 49 O. S. 351. See Huff v. Hatch, 2 Disn. 63; Bank v. Triplet, 1 Pet. 86; Mechanics' Bank v. Merchants' Bank, 6 Met. 27; Smeads

v. Bank, 20 Johns. 872. See, also, cases cited in next note.

³ Bank v. Butler, 41 O. S. 519-25.

⁴ American Express Co. v. Haire, 21 Ind. 4; 88 Am. Dec. 894; Chapman v. McCrea, 63 Ind. 360; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459.

⁵ Bridge Co. v. Savings Bank, 46 O. S. 224; Reeves v. Plow, 41 Ind. 204; Lawrence v. McCalmont, 2 How. 426.

the money, and the owner may control his paper until it is paid. An indorsement of a bank directing payment "for account of itself" does not imply that it is the owner of the paper and cannot dispute the right of the owner to stop payment thereof.¹ Where a draft is drawn in one state and is made payable in a foreign country, under whose laws the bank is not bound to inquire into the genuineness of an indorsement, and therefore pays the draft to a wrong person, such payment on a forged indorsement is good in the hands of the drawers, who are discharged from further responsibility if payment can be made in such country on a forged indorsement, as the question of default is governed by the law of the foreign country.² A person who undertakes gratuitously to collect paper, and sends it to a bank for that purpose, where the same is paid, and is lost by reason of failure of the bank, the party so undertaking the collection, though gratuitously, is liable for the loss, as the bank was his agent. It is a contract the consideration for which is not of benefit but of harm on the one hand and trust and confidence reposed in the person making the collection.³ In an action against a bank for non-presentment of paper for payment, it is not necessary to allege that the parties were insolvent at the time, if it is averred that there were funds in the bank where the paper was due and payable, as the question of solvency was immaterial so long as it appeared that the money was in the bank;⁴ though it must be alleged that the plaintiff was damaged by failure to collect.⁵

Sec. 285. Right of set-off between bank and depositor.—Where a bank has on deposit money belonging to a person who becomes insolvent, and is indebted to the bank upon notes by it declined, the proceeds of which constitute a portion of such deposit account, enough of the account can be withheld by the bank to protect and pay such notes, as against the insolvent or his assignee, but not as against *bona fide* holders of checks drawn upon such fund.⁶ So where a bank holding

¹Freeman's Nat. Bank v. Tube Works, 8 L. R. A. 42; 24 N. E. Rep. 779; 151 Mass. 418.

²Dreyfuss v. Adee, 4 W. L. B. 671-73.

³Young v. Noble, 2 Disn. 485; White v. Bank, 4 W. L. B. 791.

⁴Laughlin v. Greene, 14 Ia. 92.

⁵Perry v. Muzzer, 68 Mo. 477.

⁶Skunk v. Bank, 16 W. L. B. 358; Ford v. Thornton, 3 Leigh, 695.

notes against a depositor who has a deposit account therein makes an assignment, the depositor has the right to have the fund which he has in the bank applied on the debt due from him to the bank;¹ and the liability of a stockholder of a national bank may be set off as against a dividend due on the deposit account of such stockholder by a receiver winding up its affairs.² The rule is not changed although the claim to dividend has been assigned to others.³ But a stockholder's indebtedness against a national bank cannot be set off against the claims of the pledgee of the stock of the former, who received it in pledge to secure the payment of a loan made on the faith of such pledge, without knowledge of the claims of the bank or that it was insolvent.⁴

Where stock of a bank has been increased, and the stockholder has paid his share of such increased stock before it had been properly authorized, and the bank goes into the hands of a receiver in the meantime, such stockholder may have the payment made by him upon the increase of stock set off against any indebtedness due from him to the bank.⁵ Where a party who has made an assignment for the benefit of creditors gives a check upon a bank upon funds which he has deposited there, but prior to the date of assignment, which is paid by the bank with knowledge of the assignment, such payment cannot be raised as a defense by the bank in an action by the assignee against it for the recovery of the money.⁶

Sec. 286. Petition for damages against bank for neglect in collecting note or bill.—

[*Caption.*]

Plaintiff says that the defendant is a corporation duly incorporated under the national banking laws of the United States and doing business at —, Ohio. On the — day of —, 18—, the plaintiff delivered to the defendant a promissory note [*or, bill*], the property of the plaintiff, calling for — dollars, dated —, 18—, due in — months after date,

¹ Bank v. Hemingray, 84 O. S. 881; ² Id.; Brown v. Hitchcock, 86 O. S. a. c., 81 O. S. 168. See Waterman 667.

on Set-off, sec. 181; Smith v. Felton, ⁴ McConville v. Means, 21 W. L. R. 43 N. Y. 419; Pomeroy's R. & R., 198. sec. 163. ⁵ Armstrong v. Law, 27 W. L. R.

³ Brownell v. Armstrong, 20 W. 100.

L. R. 465.

⁶ Chaffee v. Bank, 40 O. S. 1.

made by E. F., payable to R. A., in the First National Bank of —, Ohio, and indorsed by said E. F. and L. A.

That the defendant, in consideration of the plaintiff's leaving said note with it for collection, and of plaintiff's trust and confidence in the defendant [and of — per cent. of the amount collected thereon], accepted the same for collection, and agreed to use due diligence in demanding payment.

That said E. F., maker of said note, was ready and willing to pay the same on the day of maturity, and would have paid the same, but the defendant negligently omitted to present the same for payment, and shortly thereafter said maker became and still is wholly insolvent, whereby plaintiff has wholly lost — dollars, the amount due on said note, for which he demands judgment.

NOTE.—*Thornton's Forms.* See form in *Chapman v. McCrea*, 63 Ind. 360. Damages for failure to collect must be alleged. *Perry v. Musser*, 68 Mo. 477. Insolvency of maker should be shown, otherwise damages will be limited to expenses incurred. *Hough v. Young*, 1 O. 504; *Borup v. Nininger*, 5 Minn. 523. As to solvency of indorser, see *Steele v. Russell*, 5 Neb. 211.

Sec. 287. Petition by one bank against another for failure to protest note sent it for collection, loss occurring through insolvency of the makers, and release of indorser.

[*Caption.*]

The said plaintiff, for this its cause of action against the said defendant, says that the said plaintiff and defendant are each banking corporations under the laws of the United States; that they are each doing and carrying on a general banking business, the said plaintiff at —, Ohio, and the defendant at —, Ohio.

The said plaintiff says that in the due course of its business it purchased from the payee and became, before due, the owner and holder of a note of one F. & P., residing and doing business at —, Ohio, a true copy of which note is as follows: [*Set out note.*]

That at the time of the purchase by plaintiff of said note, the said S. J. P. indorsed said note and delivered the same to plaintiff, a true copy of said indorsement being as follows: "S. S. P."

The said plaintiff further says that some time before said note became due, it sent the same to the defendant for collection and to make returns; and avers that said defendant received said note and undertook the collection thereof, and that in the event of non-payment it likewise undertook to protest said note and fix the liability of the indorser, and it held the same from date of receipt until some weeks after it was past due; that said note was not paid when due, and that said defendant failed and neglected to protest or have said note protested.

Plaintiff avers that the said makers (F. & P.) of said note made an assignment within a day or two after said note became due, and are wholly insolvent; that the said indorser (S. J. P.) has been released and discharged as an indorser from any and all liability on said note; that by reason of the failure and neglect of said defendant to cause said note to be protested when it became due and was not paid, it has been damaged and injured to the extent of and in the sum of — dollars, together with interest from —.

Wherefore the plaintiff prays judgment against the said defendant for the sum of — dollars, with interest from —.

NOTE.— It is the duty of a bank acting as agent to take the usual steps to charge the indorsers, and in this respect is liable in damages for negligence. *Ante*, sec. 284; *Bank v. Bank*, 49 O. S. 851; *Huff v. Hatch*, 2 Disn. 63; *Blam v. Bank*, 26 Am. Rep. 120. The duty of a bank in such cases is plain. *Lawson v. Bank*, 1 O. S. 206; *Bank v. McGuire*, 83 O. S. 295-304; *Daniel's Neg. Inst.*, sec. 1039. An indorser in blank binds himself to pay the note if the maker does not, and should be duly notified of non-payment. *Farr v. Ricker*, 46 O. S. 265. See *Titus v. Kyle*, 10 O. S. 444; *Collins v. Insurance Co.*, 17 O. S. 215; *Cummins v. Kent*, 44 O. S. 92; *Robinson v. Kanawha Bank*, 44 O. S. 441; *Morris v. Faurot*, 21 O. S. 155. Protest is the formal declaration of the notary, but includes all steps necessary to charge the indorser, and the sufficiency of a notice in writing is a question of law; a simple statement, however, that the paper is unpaid does not show presentment and demand. *Townsend v. Bank*, 2 O. S. 845. The notary is the sub-agent for the owner of domestic paper left with a bank for collection, and not of the bank, and the latter is not liable for the default of the notary. *Bank v. Butler*, 41 O. S. 519; *Britton v. Niccolls*, 104 U. S. 757. The bank is held liable where it employs a notary by the year and takes a bond from him. *Gearhart v. Boatman's Savings Inst.*, 88 Mo. 60.

Sec. 288. Petition for recovery on lost certificate of deposit against bank before due.—

[Caption and formal opening.]

That on the — day of —, 18—, he deposited in the defendant bank the sum of — dollars and received from said bank a certificate of deposit of which the following is a true copy [*copy*], which certificate was signed by the proper officer of the bank; that on the — day of —, 18—, at C., Ohio, he lost the certificate of deposit and his pocket-book containing the same, and has not since that time seen or heard of either, and does not know where the certificate of deposit is; that he immediately notified the bank of the loss, and not to pay the certificate, and that said certificate had not been indorsed by him; that he had not, in fact, at any time indorsed the certificate of deposit; that it was in the same condition when lost as when received by him; that he had not in any manner sold or transferred the same to any person, and that the certificate had not been presented for payment to the bank by any one; that he immediately demanded payment from the bank of the amount of the deposit, which was by the bank refused, although he offered to receipt

in full for the amount of money and against the certificate of deposit.

NOTE.—A certificate of deposit issued by a national bank is in fact a promissory note. *Citizens' Nat. Bank v. Brown*, 45 O. S. 89; *Howe v. Harkness*, 11 O. S. 449; *Hunt v. Devine*, 37 Ill. 187; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. And where it has been lost without having been indorsed, suit may be maintained thereon without the tender of indemnity. *Citizens' Nat. Bank v. Brown*, *supra*. See *Daniel's Neg. Inst.*, sec. 1481; 2 *Greenl. Ev.*, sec. 156; *Story's Promissory Notes*, sec. 451; *Thayer v. King*, 15 Ohio, 242; *Lazell v. Lazell*, 12 Vt. 143; *Aborn v. Bosworth*, 1 R. I. 401; *Moore v. Fall*, 42 Me. 450; *Depew v. Wheelan*, 6 Blackf. 485. Recovery cannot be had where the paper had been indorsed before it was lost. *Pintard v. Packington*, 10 John. 104. *Shute v. Pacific Nat. Bank*, 136 Mass. 487, holds certificates of deposit not promissory notes. Demand should be made thereon before suit according to some cases. *Downes v. Phoenix Bank*, 6 Hill, 297; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Payne v. Gardner*, 29 N. Y. 167; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. See, also, 18 Md. 320; 44 Iowa, 152; 41 N. Y. 581; 8 Met. 217. No right of action accrues until demand, and the statute of limitation would not begin to run until so made. *Howell v. Adams*, 68 N. Y. 314; *Boughton v. Flint*, 74 N. Y. 476; *Bank v. Bank*, 5 Hun, 605; *Girard Bank v. Bank*, 39 Pa. St. 92; *Patterson v. Poindexter*, 6 W. & S. 227. Indemnity required. *Lamson v. Pfaff*, 1 Handy, 449. See *Price v. Dunlap*, 5 Cal. 483; *Randolph v. Harris*, 28 Cal. 561.

Sec. 289. Legal status of checks.—Bank checks have become so engrafted into commercial law as to have become a very potent instrument. They are taken and given with such mutual confidence as to constitute almost a cash medium—passing through many hands answering the purpose of payment. It is highly important, therefore, that the rights and liabilities of parties thereto should be clearly defined. In addition to what has been before stated, a little further investigation will be made preceding the forms on this particular subject. Checks are subject to many rules which regulate the rights and liabilities of parties to bills of exchange, many authorities regarding them as bills of exchange.¹ While this may be true to a certain extent, there are some points of difference. For instance, the rights and obligations of parties to a check differ from those to a bill of exchange, in that the drawer of a check is the principal debtor, and is not discharged by any default of the holder in making presentment unless he suffers some substantial injury.² This rule has its

¹ *Morrison v. Bailey*, 5 O. S. 18; *art v. Smith*, 17 O. S. 82. See *Min-Harker v. Anderson*, 21 Wend. 373; *turn v. Fisher*, 4 Cal. 35; *In re Brown, Andrew v. Blachly*, 11 O. S. 89; 2 *Story*, 503; *Murray v. Judah*, 6 *Chapman v. White*, 2 Seld. 412. See *Cowen*, 484.

distinctions made in 5 O. S. 18; ²*Stewart v. Smith*, 17 O. S. 86; *Morrison v. Bailey*, 5 O. S. 18; *Mullick*

qualifications, however. To charge the drawer of a check the holder must present it within a reasonable time.¹

Unlike commercial paper generally, checks are not entitled to grace, but are payable on demand.² Where a person giving an antedated check subsequently makes an assignment for the benefit of creditors, and the check is paid by the bank with knowledge of the assignment but without knowledge that the check has been antedated, the fact that the bank knew that the drawee of the check had made an assignment is sufficient to put it upon inquiry as to whether or not the check had been antedated. Payment under such circumstances cannot be set up as a defense by the bank.³ A bank check, being simply a written order of a depositor to his banker to make a certain payment, is revocable by the drawee before its presentation for payment unless accepted or certified to by the bank, for the latter has otherwise become com-

v. Radkisson, 28 Eng. L. & Eq. 94; Smith v. Jones, 2 Bush, 108; Woodin v. Frazee, 6 J. & S. 190; Bank v. Alexander, 84 N. C. 80. *Contra*, Daniels v. Kyle, 5 Ga. 245; Harker v. Anderson, 21 Wend. 370.

¹Braun v. Kimberlin, 9 Am. L. Rec. 405; Work v. Bank, 8 O. S. 301. What is a reasonable time must depend on circumstances. *Id.* See, also, Davis v. Benton, 2 W. L. M. 484.

²R. S., sec. 3175; Morrison v. Bailey, 5 O. S. 13; Stewart v. Smith, 17 O. S. 82; 8 O. S. 301; 11 O. S. 89. Payment should be demanded on the day subsequent to its date (18 Wend. 133; 20 Wend. 192; 4 B. & A. 752); and the holder has the whole of the banking hours of the next day within which to present it. 2 Taunt. 388; 2 Camp. 537; 4 B. & A. 752; Story on Notes, sec. 493. Checks made payable on a certain day, or which are post-dated, are not to be regarded as bills of exchange or subject to the formality of presentment or notice required in commercial bills generally. The

rule as given is not varied as to such bill, the holder being entitled to hold it until the close of banking hours on the day next after its date. Blachly v. Andrew, 1 Disn. 78. A draft for money in the usual form of a check, but payable on a future specified day, and designed to be an absolute transfer or appropriation to the holder of so much money, will be regarded as a check and not a bill of exchange and therefore not entitled to days of grace. Andrew v. Blachly, 11 O. S. 89; 1 East, 435; 10 Wend. 304; 20 Wend. 205. A holder of a check is entitled to wait until the day following its date before presenting it to the drawee without discharging the drawer from liability. So a warrant taken from a clearing-house in lieu of a check which is afterwards dishonored will not be considered payment of the check, and the drawer of the check will be liable thereon. Merchants' Bank v. Proctor, 1 C. S. C. R. 1.

³Chaffee v. Bank, 40 O. S. 1.

mitted to its payment. A mere giving out of information by a bank that a person has on deposit a certain amount of money will not constitute an acceptance or certification of the check, or otherwise create an obligation on the bank to pay checks which an inquirer may then hold.¹

Checks being placed substantially in the same category with bills and notes, the same rules apply where they are signed by a person as agent without in any way indicating the name of the principal, the party signing as agent being himself liable.² Nor can a drawer of a check make a defense, as in the case of bills, that no presentment or notice was given. Delay in presenting checks cannot be pleaded as a defense unless the fund is in some way lost in the meantime.³ There is no liability on memorandum checks exchanged by parties for their mutual accommodation until paid;⁴ but where parties have exchanged checks upon the same bank for the same amount, one of whom transferred his check to a creditor as collateral, it will not be considered accommodation paper, and the person to whom it was pledged may recover the amount.⁵ In such cases the paper is founded on a valuable consideration, being a mutual promise for the benefit of each other.⁶

A check for part of a fund of a depositor does not operate as an assignment *pro tanto* of the fund on which it is drawn, and bind the bank to its payment out of the fund when presented without acceptance by the bank.⁷ It is not payment of a debt for which it is drawn unless it be so agreed between the parties, and the debt will not be extinguished unless the check is paid or the holder guilty of neglect which may operate as a discharge of the drawee.⁸ Where a check is given in payment of taxes, but is not presented on the next day after its receipt by the treasurer, and the bank upon which it is drawn fails, such check will not be considered payment. The ordinary

¹ Kahn v. Walton, 46 O. S. 195.

⁵ Rankin v. Knight, 1 C. S. C. R. 515.

² Anderson v. Sharp, 17 O. S. 126;
5 Gray, 561; 11 Mass. 27; 8 Met. 442;
10 Wend. 276.

⁶ Id.; Cowley v. Dunlop, 7 T. R.
565; Buckler v. Brettivant, 3 East
72; Eaton v. Carey, 10 Pick. 214;

³ McGregor v. Loomis, 2 Disn. 251;
2 Hill, 425. If the drawer have no
funds in the bank he cannot com-
plain. Fletcher v. Pierson, 69 Ind.

Dowe v. Schutt, 2 Denio, 623; Whit-
tier v. Eager, 1 Allen, 499; Higgin-
son v. Gray, 6 Met. 218; Trustees v.
Hill, 12 Met. 462.

281; Culver v. Marks, 122 Ind. 554.

⁷ Bank v. Brewing Co., 50 O. S. 151.

⁴ Burdsall v. Chrisfield, 1 Disn. 51.

⁸ Kahn v. Walton, 46 O. S. 195.

rule will not apply as against the state, and on account of the crowded state of business such non-presentment will not constitute a defense.¹ It may serve as a good tender of payment where the parties waive all objections.² A check given in payment of money lost at gaming being void, an indorsee can not recover the same from the drawee.³ It will not operate as a gift unless accepted or paid.⁴ A check being considered a mere chose in action and not a transfer of the fund unless accepted,⁵ a third person may, therefore, before the same is presented, attach the funds of the bank, as the bank is only a debtor.⁶ The holder of a check can not maintain an action against the bank upon which it is drawn for its refusal to pay, although the bank has money of the drawer upon deposit.⁷ This follows because the bank is liable to the drawer for its failure to honor the checks.⁸

Sec. 290. Petition of payee against drawer of check.—

[*Caption and formal opening.*]

There is due the plaintiff from the defendant company, as drawer, the sum of — dollars, which he claims with interest from the — day of —, 18—, on a bank check, of which the following is a copy of all credits and indorsements thereon, to wit: [*Copy.*] Payment of said check was duly demanded at said bank at maturity, but defendant had no funds at said bank, and the same was not paid; but on the — day of —, 18—, said bank paid the sum of — dollars only, and the balance was not paid for the reason that the defendant had no funds at said bank, and was not paid, of all of which defendant had due notice [*or, that on the — day of —, 18—, said check was duly presented to said bank for payment, but was not paid, and thereupon plaintiff demanded of the defendant that he pay the same, which was refused.*] There is now due on said check a balance of — dollars with interest from —, for which amount demand was duly made [*or, that no part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of — dollars.*]

Wherefore plaintiff asks judgment against the said defendant in the sum of — dollars with interest from the — day of —, 18—.

NOTE.— From *Frey v. Gragg*, unreported case, S. C., No. 1646. It is held that in an action against a drawer of a check it should be averred that demand and notice of non-payment to the drawer has been made. *Insurance Co. v. Coons*, 35 Iowa, 364; *Shultz v. Dupuy*, 3 Abb. Pr. 252; *Judd v. Smith*, 8 Hun, 190. But see *ante*, sec. 289. If the drawee is insolvent, as against the drawer it is immaterial or not necessary to make presentment and give notice. *Lovett v. Cornwell*, 6 Wend. 869.

Consideration.— It is not necessary to aver consideration, as the check imports it. *McClain v. Lowther*, 35 W. Va. 297.

¹ *Mauck v. Fratz*, 4 W. L. B. 1044. ⁴ *Simmons v. Savings Society*, 41

² *Jennings v. Mendenhall*, 7 O. S. O. S. 457.

257.

³ *Bank v. Portner*, 46 O. S. 381; *v. Bank*, 46 N. Y. 82.

R. S., sec. 4269.

⁵ *Cain v. Bank*, 107 Mass. 45; *Bank*

⁶ *Imboden v. Ferrie*, 18 Lea. 504.

⁷ *Railroad Co. v. Bank*, 54 O. S. 60.

⁸ *Id.*

Sec. 291. Petition by indorsee against drawer.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, the defendant drew his check in writing upon the First National Bank of O., Ohio, thereby directing said bank to pay to the order of — the sum of — dollars, of which the following is a copy, to wit: [*Copy.*] That the said J. S. indorsed said check to this plaintiff as follows: [*Copy.*] Plaintiff presented said check to said bank for payment, which was refused, due notice of which was given said defendant. Plaintiff thereupon demanded payment of said defendant, but he has wholly failed and refused to pay the same.

Wherefore plaintiff asks judgment against said defendant for the sum of \$—, etc.

NOTE.—See note in *ante*, sec. 287. As to right of recovery by indorsee against drawer when delay has been made in presenting check and bank has failed in meantime, see *Hamilton v. Salt & Lumber Co.*, 54 N. W. Rep. 908 (Mich., 1893).

Sec. 292. Petition of drawer against drawee.—

[*Caption and formal opening.*]

That on the — day of —, 18—, the plaintiff had on deposit in the defendant's bank — dollars, subject to any check he might draw thereon.

That on said day he drew his check on said defendant requesting him to pay C. or order — dollars.

That said C. indorsed the said check to R., who indorsed the same to L.

That on the — day of —, 18—, and while said sum of money was still on deposit in said bank, said L. presented said check during banking hours to the defendant for payment, which was refused, whereby plaintiff was compelled to pay the same, to his damage in the sum of — dollars, for which he demands judgment.

NOTE.—A *bona fide* holder of a check has a right of action against the drawee in case payment is refused when the drawer has sufficient funds on deposit. *McGregor v. Loomis*, 1 Disn. 247, 248. See sec. 2, *ante*.

Sec. 293. Certified checks and form of petition.—The certification of a check does not completely change its character. It produces a different relation between the original parties; the drawee ceases to be the debtor of the drawer, but it remains an order for payment, and operates in favor of third parties merely as an assurance that it is genuine and will be paid. It makes a difference, however, upon whose request the same is certified. If a holder instead of presenting a check for payment procures the bank upon which it is drawn to certify it as a claim or demand upon the bank, or

puts it into circulation, the drawer will be released.¹ But if a drawer causes his check to be certified before it leaves his hands, it does not discharge him from liability to the holder thereon if the same is duly presented for payment and notice given of its non-payment.² It becomes substantially a certificate of deposit in the holder's hands, and the fund ceases to be under the control of the depositor. The party accepting the check does not take the risk of the solvency of the bank, as acceptance of a certified check does not constitute payment any more than does an ordinary check,³ the person receiving it simply as an additional security for payment, and if it is presented within due time, payment refused and due notice given to the drawer, he cannot complain.⁴ A certificate that a check "is good" is equal to an acceptance thereof.⁵ A bank certifying a check certifies the genuineness of the drawer's signature and that it has funds with which to meet it, but does not warrant the genuineness of the body of the check as to the payee or the amount secured.⁶ A petition against a bank upon a certified check may be in the following form:

[*Caption.*]

Plaintiff says that defendant is a corporation duly organized as a national bank under the laws of the United States and located at C., Ohio; that on the — day of —, 18—, Jno. Doe made delivery to the plaintiff of a check of which the

¹ *Born v. Bank*, 123 Ind. 78; *Cincinnati Oyster Co. v. Bank*, 4 O. C. C. 135; *aff'd*, 51 O. S. —; *Bank v. Leach*, 52 N. Y. 350; *Bank v. Jones*, 12 L. R. A. 492; 27 N. E. Rep. 533; *Bank v. Cornhauser*, 87 Ill. App. 475.

² *Cincinnati Oyster Co. v. Bank*, *supra*.

³ *Barr v. National Bank*, 24 W. L. B. 260 (Ind.).

⁴ *Morse on Banking*, secs. 414-416; 52 N. Y. 850; 42 Ill. 238; 43 Ill. 497; 82 N. Y. 1.

⁵ *Nolan v. Bank*, 67 Barb. 24; *Bank v. Leach*, 52 N. Y. 350; *Simpson v. Insurance Co.*, 34 Cal. 139.

⁶ *Bank v. Bank*, 67 N. Y. 458; *Marine Bank v. Bank*, 59 N. Y. 67; *National Bank v. National Bank*, 55

N. Y. 211. See 14 Am. Rep. 232; 56 Mo. 503; 89 N. Y. 418. It amounts to an acceptance by the bank (*Barnes v. Bank*, 19 N. Y. 159; *Simpson v. Insurance Co.*, 44 Cal. 139; *Bank v. Leach*, 52 N. Y. 350; *Meads v. Bank*, 25 N. Y. 146; 82 Am. Dec. 331), thereby binding itself to hold the necessary funds for its payment. *Bank v. Butchers*, 16 N. Y. 125; 65 Am. Dec. 678; *Rounds v. Smith*, 42 Ill. 245. The bank becomes in fact the principal debtor and the drawer is discharged. *Bank v. Leach*, 52 N. Y. 350; *Bank v. Whitman*, 94 N. Y. 343. A certificate of deposit is regarded as a negotiable promissory note. *Citizens' Bank v. Brown*, 45 O. S. 39.

following is a copy with all the indorsements thereon, to wit:
[*Copy.*]

That on the — day of —, 18—, the plaintiff presented said check to the said defendant, who by its duly authorized agent accepted the same in writing and certified the same to be good, which certification is in the following words, to wit:
[*Copy of acceptance.*]

That plaintiff presented said check to the said defendant bank and demanded payment thereof, which was refused, and there is now due thereon from the said defendant to the plaintiff the sum of — dollars.

Wherefore plaintiff asks judgment against the defendant, etc.

Sec. 294. Answer that certified check was a forgery.--

[*Caption.*]

That it admits that it certified the check sued on in this action, but alleges that said check was a forgery in this: That it was drawn by R. F. for the sum of — dollars, but it was altered and changed by some one unknown to defendant by raising said sum of — dollars to — dollars.

That defendant had no knowledge, at the time it certified said check, that the same had been altered, but discovered the same afterward.

CHAPTER 22.

BILLS AND NOTES.

- Sec. 295. Parties to actions on notes and bills.
296. Petition on notes and bills—General rules.
297. Consideration—Rules of pleading.
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299. Indorsement.
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BILLS OF EXCHANGE—FORMS OF PETITIONS.

- Sec. 302. Petition by indorsee against acceptor, drawer and indorser.
303. Petition by acceptor against drawer.
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NOTES—FORMS OF PETITIONS.

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313. Petition against maker, indorser and guarantor.
314. Simple form of petition by indorsee of note for value.
315. Petition by indorsee against indorser in case of failure to give notice for want of funds.
316. Petition by purchaser for value against administrator of deceased maker and indorsers of note.
317. Petition by payee of note against executor.
318. Petition by indorsee against indorser without recourse who warranted a forged instrument.
319. Petition by bank as assignee for value on note of corporation.
320. Petition on note wrongly dated.
321. Petition for instalment due on note.
322. Petition for interest due on note.
323. Petition on notes, and to correct error in accounting thereon.
324. Petition by partnership against partners as makers and indorsers.
325. Petition by surviving partner against a firm on note.
326. Petition by payee against surviving partner on note.

Sec. 327. Actions on lost, destroyed or stolen instruments, with form of petition.

DEFENSES.

Sec. 328. Answers to actions on notes and bills—General rules.

329. Defense when indorsed or delivered before maturity.

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331. Defenses—Failure of consideration.

ANSWERS—FORMS—BILLS.

Sec. 332. Answer of unauthorized acceptance.

333. Answer of payment before indorsement.

334. Answer of acceptance for accommodation of plaintiff.

ANSWERS—FORMS—NOTES.

Sec. 335. Answer denying obligation as maker, claiming that of accommodation indorser.

336. Answer of indorser setting up verbal agreement as to indorsement.

Sec. 337. Answer denying execution, and setting up want of consideration—A mere gift.

338. Answer that note was purchased with notice that it was accommodation paper.

339. Answer of want of consideration by reason of failure of title to property.

340. Answer that note was given for gambling.

341. Answer that consideration was for a patent-right.

342. Alteration of notes.

343. Answer denying execution of note; that it was altered after execution by payee.

344. Answer that note was altered by the addition of a name.

345. Reply that note was purchased in usual course of business.

Sec. 295. Parties to actions on notes and bills.—The code requires that actions should be brought in the name of the real owner or party in interest, whether his title be legal or equitable, and that ownership should fully appear in the petition.¹ Makers and indorsers may be joined in one action, but the facts showing their liability must be stated.² In an action, however, by an indorsee of a note or bill, it is not generally considered necessary to make a specific allegation showing the relationship of parties, as that appears fully from the copy incorporated in the petition, although it is largely a matter of taste. The holder of a note as collateral security is the real party in interest and may bring an action in his own name;³ and where a note has been assigned to

¹ R. S., sec. 4993; *ante*, sec. 8; Maxwell on Code Pldg. 95; Bliss on Code Pldg., sec. 233. See *post*, sec. 296.

² Maxwell on Code Pldg. 128-9.

³ Herron v. Cole, 25 Neb. 692; Williams v. Norton, 3 Kan. 295;

another for collection merely, suit may be brought by such party as the real party in interest, although the only interest which he may have is his compensation for collection.¹ An agent to whom paper is indorsed for collection may bring suit if his indorser could have maintained an action thereon, although he is bound to account to the payee for the proceeds.² And an indorsee of a promissory note may sue the indorser before suing the makers, the latter not being necessary parties to the suit;³ or an agent may bring an action in his own name, if he has possession and the legal title at the time, although the note be indorsed to another.⁴ Where a note is made by consent of all parties to one in trust for others, such person may sue without joining the remainder, even though he be a trustee, and if the note is made to him in his individual name he need not sue in his representative capacity;⁵ or a note payable to the president of a bank may be sued on by him alone as trustee of an express trust.⁶ Where the payee of a note has possession of it, he may strike out an indorsement thereon by him and maintain an action in his own name without a re-assignment.⁷ The payee of a note who transfers it by writing his name on the back, guarantying its payment, may be sued jointly with the maker.⁸ The holder or payee of a check cannot maintain an action in his own name against the drawee when the same has not been accepted.⁹ Under the provision of the code that an action must be brought in the name of the real party in interest, a defense

Van Eman v. Stanchfield, 18 Minn. 75; Wetmore v. San Francisco, 44 Cal. 294.

¹ See *ante*, sec. 8; White v. Stanley, 29 O. S. 438; Allen v. Brown, 44 N. Y. 238; Meeker v. Claghorn, 44 N. Y. 349; Eaton v. Alger, 47 N. Y. 345; Hays v. Hathorn, 74 N. Y. 486; Curtis v. Sprague, 51 Cal. 389; Smead v. Fay, 1 Disn. 531; Hardin v. Helton, 50 Ind. 319.

² Wintermute v. Torrent, 83 Mich. 555; Moore v. Hall, 43 Mich. 143; Eaton v. Alger, 47 N. Y. 345; Webb v. Morgan, 14 Mo. 428; Wetmore v. San Francisco, 44 Cal. 294; Williams

v. Norton, 3 Kan. 295; Beattie v. Lett, 28 Mo. 596.

³ McGhee v. Bank, 98 Ala. 192; Corbin v. Bank, 87 Va. 661.

⁴ Smead v. Fay, 1 Disn. 531.

⁵ Scantlin v. Allison, 12 Kan. 85; Nicolay v. Fritschel, 40 Mo. 67. See *ante*, sec. 9.

⁶ Wolcott v. Standley, 62 Ind. 193.

⁷ Spencer v. Carstarphen, 15 Colo. 445; 24 Pac. Rep. 882 (1890).

⁸ Kautzman v. Weirick, 26 O. S. 330.

⁹ Boettcher v. Bank, 15 Colo. 16; 24 Pac. Rep. 582 (1890).

that one of the parties has assigned his interest is available only by an answer denying such interest.¹ An action cannot be maintained against both principal and agent where it is claimed that the maker of a note acted as agent in its execution.²

Sec. 296. Petition on notes and bills — General rules.— In framing a petition under the code in an action on a promissory note or bill of exchange, a copy of the note with all the credits and indorsements thereon should be incorporated in the petition or attached thereto.³ It is considered unnecessary, when there are no indorsements, to so aver, although it is the better practice to do so;⁴ nor is an omission to state that all the credits are given in the copy fatal.⁵ If the short form prescribed by section 5086 of the code be adopted, it is only necessary to state that there is due upon the note a specified sum.⁶ When others than the makers of a note or acceptors of a bill are parties, the facts which fix their liability should be stated.⁷ Thus, under this statute, in an action by an indorsee of a note, it is sufficient merely to frame the petition in the usual form, giving a copy of the note, as title or ownership is implied from an allegation that there is due a specified sum.⁸ A petition which merely avers the execution of a note and gives a copy thereof shows a promise to pay.⁹ And so, if a note is made part of a petition, it is immaterial whether it be averred that the same is payable to plaintiff.¹⁰ Merely averring ownership in the plaintiff without

¹ *Hanna v. Ingram*, 98 Ala. 482; L. M. 420; *Swan's P. & P.* 184-6. 9 S. Rep. 621 (1891). This is the construction given to

² *Bank v. Turner*, 24 N. Y. S. 794.

³ See *ante*, secs. 57, 58, where this is fully discussed.

⁴ *Ives v. Strickland*, 4 W. L. B. 852.

⁵ *Ingersoll v. Craw*, 1 Clev. Rep. 1.

⁶ R. S., sec. 5086; *ante*, sec. 57. Plaintiff must show what sum there is due before a defendant can be called upon to deny. *Villers v. Lewis*, 1 Handy, 89.

⁷ R. S., sec. 5086; *ante*, sec. 57.

⁸ *Sargent v. Railroad Co.*, 32 O. S. 440; *Bank v. Jacobson*, 15 Abb. Pr. 218. See *Ohio Life Ins. Co. v. Goodin*, 1 Handy, 31; *Meyers v. Miller*, 2 W.

This is the construction given to similar provisions in the codes of other states. *Prindell v. Carruthers*, 15 N. Y. 425; *Bank v. Jacobson*, 15 Abb. Pr. 218. It is held in California that an averment that there is a certain amount due upon a note is a mere conclusion of law. *Frisch v. Caler*, 21 Cal. 71; *Davanay v. Eggenhoff*, 48 Cal. 395. Title may be stated by alleging that plaintiff owns the note. *Insurance Co. v. Goodin*, 1 Handy, 31.

⁹ *Reynolds v. Baldwin*, 98 Ind. 57.

¹⁰ *Jaqua v. Woodbury*, 3 Ind. App. 289; 29 N. E. Rep. 573 (1892).

setting forth indorsements or otherwise showing title will not be sufficient.¹ An allegation that a note was made to the plaintiff is a sufficient averment of ownership without alleging delivery;² and so with an averment that a payee of a note sued on indorsed it to plaintiff by writing his name on the back.³ A defendant may prove that the plaintiffs are not the owners of a note, even where there is no such issue made by the plaintiffs in the case.⁴ A failure to allege that an indorsement and delivery of a note was for value and before maturity is not ground for a demurrer.⁵

Where a note or bill has been dishonored it is necessary to state that fact in the petition; and in an action against the maker and indorser of a note, an allegation that the same was presented at maturity to the maker for payment but was unpaid, due notice of which was given to the indorser, is a sufficient allegation of presentment, refusal and notice.⁶ Or in an action by an indorsee against an indorser of a bill, an allegation that the same was presented to the drawee "for acceptance and was then and there by him declined and refused acceptance, and not accepted," is a sufficient averment of demand of acceptance;⁷ but an averment that a note was protested is not equal to an averment that it had been duly presented to the maker for payment and that payment was refused.⁸ And so where it is claimed that demand and notice have been waived it is equally essential that the facts constituting such waiver be fully set forth, as proof of waiver cannot be admitted under a general allegation of presentment and notice of dishonor.⁹ Where it is necessary that an acceptance of a bill or guaranty should be in writing, a mere averment that the bill was accepted,¹⁰ or that the guaranty was

¹ Gould v. Insurance Co., 8 W. L. B. 281.

² Keteltas v. Meyers, 19 N. Y. 232; 24 N. Y. 547; 12 How. Pr. 452, 460.

³ Rubelman v. McNichol, 18 Mo. App. 584.

⁴ Russell v. Gregg, 49 Kan. 89; 30 Pac. Rep. 185 (1892). It is not necessary to allege that a note was delivered. Keesling v. Watson, 91 Ind. 578; Doane v. Dunlap, Tap. 113.

⁵ Rubelman v. McNichol, 18 Mo. App. 584.

⁶ Young v. Miller, 68 Cal. 302; Fisk v. Miller, 68 Cal. 367; Spencer v. Locomotive Works, 17 Abb. Pr. 110.

⁷ Bank v. Hatch, 78 Mo. 18.

⁸ Price v. McClare, 3 Abb. Pr. 253.

⁹ Pier v. Heinrichoffen, 52 Mo. 338-336.

¹⁰ Bank v. Edwards, 11 How. Pr. 216.

made,¹ without stating that it was accepted or made in writing, will be sufficient, as it will be implied from the mere allegation that it was in writing. It should not only appear that there was a promise made but that it was broken,² though an averment that there is due and owing a certain sum of money is generally conceded to be a sufficient allegation as to non-payment;³ and so with an allegation that no part of a note, principal or interest, has been paid.⁴ But a petition will not be held insufficient if it fails to aver that a note is due at the commencement of the action if the copy embodied in the petition by its terms shows that it fell due before the same was filed.⁵ An allegation which states that only part of the principal sum demanded still remains due and unpaid is insufficient to sustain a judgment.⁶ But failure to allege that some part is due and unpaid is a defect which will vitiate a judgment by default.⁷

Sec. 297. Consideration — Rules of pleading.—It is well understood that a promissory note imports consideration, and hence it is unnecessary in an action thereon to aver that the same is founded on a valuable consideration.⁸ And so a description of a note in a pleading is sufficient without an averment of consideration.⁹ Consideration is likewise presumed from indorsement and delivery, rendering it unnecessary in an action by the holder against an indorser to state that the note was transferred for a valuable consideration, as that would be matter of defense to be set up in the answer.¹⁰ An averment that a guarantor is liable both as an indorser and guarantor implies a transfer of the note of the guarantor to the guarantee, and imports consideration for the contract of guaranty.¹¹ A note made on condition that

¹ *Miles v. Jones*, 28 Mo. 87.

² *Villers v. Lewis*, 1 Handy, 89.

³ *Keteltas v. Meyers*, 19 N. Y. 281.

⁴ *Jones v. Frost*, 28 Cal. 245.

⁵ *Postel v. Oard*, 1 Ind. App. 252;
27 N. E. Rep. 584 (1891).

⁶ *Notman v. Green*, 90 Cal. 172; 27
Pac. Rep. 157 (1891).

⁷ *Barney v. Vigoreaux*, 92 Cal. 631.

⁸ *Dugan v. Campbell*, 1 O. 115; 2
Bates' Pldg. 830; *Keesling v. Watson*,

91 Ind. 578; *Leach v. Rhodes*, 49 Ind.

291; *Winters v. Rush*, 84 Cal. 136;

Durland v. Pitcairn, 51 Ind. 456;

Peets v. Bratt, 6 Barb. 662; *Keteltas*

v. Meyers, 19 N. Y. 231; *Lindell v.*

Roakes, 60 Mo. 249; *Search v. Miller*,

9 Neb. 26.

⁹ *Underhill v. Phillips*, 10 Hun, 591.

¹⁰ *Dumont v. Williamson*, 18 O. S.

515.

¹¹ *Clay v. Edgerton*, 19 O. S. 549.

the payee shall, during a certain specified time, abstain from intoxicating liquor, is a sufficient consideration to sustain an action.¹ Where the defense is interposed in an action by an indorser upon a note that he is not an innocent holder for value, the amount paid by him for the note is only important so far as it affects the good faith of the purchaser, and he is a *bona fide* holder even though he has paid a sum less than its fair and reasonable value.²

Sec. 298. Bona fide holders — Rights of.— A person who takes paper before maturity for a valuable consideration in the usual course of trade, without knowledge of any facts that would impeach its validity in the hands of the original parties, holds it by a good title.³ But the maker is not liable as against the holder if the former was induced by fraud to believe that he was signing an instrument other than a promissory note.⁴ A person taking a note given for a patent-right with knowledge of its consideration takes it subject to such defenses only as would have existed against it if such words had been legibly written or printed thereon.⁵ The title of a *bona fide* holder of a "red line wheat" note cannot be impeached by showing that he took it under circumstances which ought to have excited the suspicion of a prudent man.⁶ To become a *bona fide* holder it is not necessary to pay the full face value of a note.⁷ A person possessed of ordinary faculties and ability to read, who signs a note without knowledge of what he is signing, without reading it, but relying solely on the representations of the payee that it was a paper other than a note, cannot be permitted, as against a *bona fide* holder before maturity for value, to deny its execution;⁸ nor can a person who negligently signs and delivers a printed note without knowledge of what it is deny the authority of a person to whom it was delivered to fill the blanks therein as against a *bona fide*

¹ Lindell v. Rokes, 60 Mo. 249.

⁵ Tod v. Wick, 36 O. S. 370. See sec. 297.

² Tod v. Wick, 36 O. S. 370; Rooker v. Rooker, 29 O. S. 1; Kitchen v. Laudenbach, 8 O. C. C. 228; Bailey v. Smith, 14 O. S. 396.

⁶ Kitchen v. Laudenbach, 8 O. C. C. 228; aff'd in 48 O. S. 177. See 4 O. C. C. 65; Johnson v. Way, 27 O. S. 374.

³ Johnson v. Way, 27 O. S. 374.
⁴ De Camp v. Hamma, 29 O. S. 487. See Kingsland v. Pryor, 38 O. S. 12.

⁷ Baily v. Smith, 14 O. S. 396.

⁸ Winchel v. Crider, 29 O. S. 480.

holder.¹ If it be admitted that a note has been obtained by fraud, a *bona fide* indorsee before due, in an action by him, must prove that he received it without notice, for value and in due course of trade.² An answer to an action on a bill not indorsed by the payee, denying that the plaintiff is the owner, and alleging that he did not receive it in due course of trade, is a good defense.³ The holder of negotiable paper will be protected against defenses arising after the maker has notice of the transfer.⁴

Sec. 299. Indorsement.—There are many difficult questions connected with the subject of indorsement. The contract is largely implied from circumstances; but an indorsement of a note made to transfer title to a purchaser, though in blank, is an absolute contract in writing, by which the indorser binds himself to pay the note, if on presentment the maker does not, provided due notice has been given of non-payment.⁵ Parol evidence is oftentimes permitted to show the relationship of parties or the nature of the contract. A party indorsing a note without recourse nevertheless impliedly warrants that the signatures of prior parties whose names appear thereon are genuine.⁶ An indorser transferring a note upon condition that the same is to be collected at the risk of the indorsee is still responsible for the note if it proves to be forged.⁷ Where a debtor of a bank has transferred paper to the latter as payment of indebtedness owing it, indorsing it to the cashier, the latter may maintain an action thereon; and a defense cannot be made thereto of which neither the bank nor the cashier had notice at the date of indorsement, if made before maturity.⁸ The mere allegation in a petition that a defendant is liable as indorser and guarantor implies consideration.⁹ A blank indorsement may be reformed by way of defense; but this should be by cross-petition with a prayer therefor,

¹ *Ross v. Doland*, 20 O. S. 478.

⁶ *Dumont v. Williamson*, 18 O. S. 515.

² *White v. Francis*, 4 Am. Law Rec. 501.

⁷ *Shave v. Ehle*, 16 Johns. 201; 20 N. Y. 326.

³ *Louisville Banking Co. v. McDonald*, 1 Clev. Rep. 1.

⁸ *White v. Stanley*, 20 O. S. 428.

⁴ *Beard v. Dedolph*, 39 Wis. 142.

⁹ *Clay v. Edgerton*, 19 O. S. 553;

Howe v. Kimball, 2 McLean, 108;

⁵ *Farr v. Ricker*, 46 O. S. 265, and cases cited. *Heaton v. Hulbert*, 8 Scam. 490.

and should be supported by clear and convincing proof.¹ While a person who is in possession of negotiable paper under a blank indorsement is *prima facie* the owner thereof and entitled to sue thereon, yet this presumption may be rebutted and the rights of the real owner established.² The mere indorsement upon a note of a stranger's name is *prima facie* evidence of guaranty in the absence of proof that it was made at the time of execution.³ So, where a stranger indorses a note before maturity and before its transfer to a third party, the owner and holder thereof may recover against him as an unconditional guarantor without proof of demand and notice.⁴ Where, before delivery of a note to the payee, a person becomes responsible thereon only as an indorser for accommodation, of which the payees had notice, such payees only hold an equitable title subject to all equities between the original parties;⁵ but where a person who writes his name on the back at the time of the execution refuses to become a general maker, intending to become only an indorser, he will be regarded as a conditional guarantor.⁶ The contract of an accommodation indorser is entire, and the note cannot be made payable part to one person and part to another without the consent of the parties thereto.⁷ An answer stating that the defendant placed his name on a note as an accommodation merely, and that there was no agreement that he was to be liable to a greater extent than as an accommodation indorser, is a sufficient general denial of an allegation in a petition charging him as a general maker, and the burden of proof is on the defendant.⁸

Sec. 300. Pleading demand and notice.—It is an elementary rule that, in order to charge an indorser of a note, the petition should allege presentment at maturity and due notice to the indorser of non-payment. The law on this subject is strict and well defined. There are exceptions, however, to

¹ Farr v. Ricker, 46 O. S. 265.

² Osborn v. McClelland, 43 O. S. 284.

³ Champion v. Griffith, 18 O. 228; Robinson v. Abell, 17 O. 86; Oldham v. Broom, 28 O. S. 52; 18 O. 441; 9 O. 132.

⁴ Castle v. Rickley, 44 O. S. 490.

⁵ Seymour v. Leyman, 10 O. S. 283.

⁶ Seymour v. Micky, 15 O. S. 515.

⁷ Erwin v. Lynn, 16 O. S. 532.

⁸ Parrish v. Mears, 1 Handy, 492.

this rule. It is also a familiar rule that presentment, protest and notice may be waived verbally, by writing, or implied from acts which are of sufficient character to convince the mind that a waiver was intended;¹ or it may be necessary where an indorser has taken an assignment of the maker's property;² or there may be other circumstances which excuse notice. It is quite essential that the petition should contain a clear statement of the fact of presentment and notice, and if it has been waived it is equally necessary to allege the facts which dispense with it,³ as facts dispensing with or waiving demand and notice to charge an indorser cannot be proved under an averment of demand and notice.⁴

As the rules of pleading require the pleader to state the substantive facts constituting his cause of action, and not the evidential facts,⁵ a complaint alleging demand and notice upon a note in a case where an indorser has made a promise to pay, with full knowledge of the failure on the part of the holder thereof to make presentment and give notice, need not allege those facts, but the usual allegations of demand, non-payment and notice of dishonor will be sufficient when sustained by proof of such facts.⁶ An allegation that a note was presented at maturity to the maker for payment but that it was not paid, of which the indorser had due notice,⁷ or an averment that a bill was presented on a day before or after the expiration of the days of grace, with an additional allegation that the bill was due;⁸ or that a bill was presented to a drawee for payment without stating when, and that payment was refused;⁹ or a general allegation, in an action on a bill against a drawer, that the same was not paid though duly presented

¹ *Glaze v. Ferguson*, 48 Kan. 159;
Markland v. McDaniel, 51 Kan. 350;
 32 Pac. Rep. 1114; *Goves v. Vining*,
 7 Metc. 212; *Singerson v. Mathews*,
 20 How. 496.

² *Bank v. McGuire*, 38 O. S. 295;
Kyle v. Green, 14 O. 495; *Delveling*
v. Ferris, 18 O. 170; *Baird v. West-*
erman, 32 O. S. 29.

³ *Clark v. Tryon*, 28 N. Y. S. 780.

⁴ *Hudson v. Wolcott*, 2 Clev. Rep.
 194.

⁵ *Ante*, sec. 50.

⁶ *Clark v. Tryon*, 28 N. Y. S. 780.
 See also 2 Daniel's Neg. Inst., sec.
 1157; *Tubbetts v. Dodd*, 28 Wend.
 379; *Meyer v. Hibsher*, 47 N. Y. 265;
Ross v. Hurd, 71 N. Y. 145; *Bank v.*
Moffat, 15 N. Y. S. 339; *Camp v.*
Bates, 11 Conn. 487.

⁷ *Young v. Miller*, 63 Cal. 302; *Fisk*
v. Miller, 63 Cal. 367.

⁸ *Peabody v. Fisher*, 8 O. 535.

⁹ *Heaver v. Beatty*, 2 W. L. G. 333.

for payment, of which the drawer had notice,¹—have all been held sufficient allegations.

Where demand and notice are unnecessary because of the fact that an indorser has sufficient property in his possession to indemnify himself, the following averment may be made in the petition: "The said plaintiff also avers that he was excused from making a demand upon said W. H. P., or from notifying the said defendant that said notes were unpaid on the — day of —, 18—, because he says that said J. B. (indorser) then had sufficient effects in his possession, by virtue of a chattel mortgage (or whatever the security is), to fully and completely indemnify him against the payment of said promissory note."

In an action against a guarantor, where the contract of guaranty is absolute and unconditional, it is not necessary to aver or prove demand or notice; but where the contract is dependent upon a condition, a compliance with the contract must be fully alleged and proved in order to warrant a recovery thereon.² To charge guarantors, demand and notice must be given.³ An allegation that a note was protested after due notice has been held not equivalent to an allegation that it was presented for payment.⁴

Demand and notice is essential where a note is made payable in instalments in order to charge an indorsee in case of default in the payment of any instalment.⁵ If the maker of a note be dead, demand should be made upon his administrator.⁶ Demand on one of several joint makers is sufficient to charge an indorser.⁷ Demand need not be made by a party whose name is on the note in the position of a promisor

¹ Wood v. Dillingham, 1 Handy, 29; Gay v. Paine, 15 How. Pr. 107; Radway v. Mather, 5 Sand. (S. C.) 654.
² Clay v. Edgerton, 19 O. S. 553; Bashford v. Shaw, 4 O. S. 266; Brown v. Curtis, 2 N. Y. 225; Reed v. Hillhouse, 7 Conn. 523.

³ Greene v. Dodge, 2 O. 431, the court saying that a contract of guaranty is in its very nature conditional.

⁴ Price v. McClae, 5 Duer, 670; Cook v. Warren, 88 N. Y. 87. The

allegation in this case was: "Whereupon the said note is then and there duly protested for non-payment, all of which the said H. had notice." Protest is one thing and notice is another; the former may be made and the latter omitted.

⁵ Mallon v. Stevens, 6 W. L. B. 69.

⁶ Huff v. Ashcraft, 1 Disn. 277.

⁷ Remington v. Harrington, 8 O. 507.

who is in fact an indorser, as the indorsers, having no recourse on him as a maker, cannot lose anything by the want of it.¹ If a maker informs a bank on the day a note falls due that he cannot pay it, it is sufficient to warrant a finding that a demand was made.² The presentation of a note at a bank where it is payable on the day of maturity, there being no funds at the bank to meet it, is sufficient evidence of demand and refusal.³ A demand may be made after business hours at the place where a note is payable if there is any one there to answer.⁴

Demand on a principal debtor and notice to a guarantor is necessary only when the fact of the liability of the latter is within the knowledge of the guarantee; but if the facts upon which his liability rests are known to the guarantor, or each party has equal information, he must take notice at his peril.⁵ Demand and notice is not necessary upon a guarantor where the promise becomes an original one,⁶ nor where the guarantor has indemnity.⁷ No averment of demand and notice is necessary where a guarantor writes upon a note, "I guaranty the payment of the within note to C. E. or order."⁸ Demand and notice may sometimes be unnecessary, as when a holder has been thrown off his guard by the conduct of an indorser.⁹

Questions of the sufficiency of demand and notice and of the proper parties upon whom it shall be made are frequently important in making defenses to actions upon notes. It is essential that notice either expressly or by implication inform an indorser of the dishonor of a bill,¹⁰ and containing a sufficient description of the instrument, inaccuracy not misleading being immaterial,¹¹ and must show, by implication at least, that the note was duly presented to the maker and dis-

¹ Greenhough v. Smead, 8 O. S. 415.

⁷ Kyle v. Green, 14 O. 495; Mc-

² Heman v. French, 2 C. S. C. R. 561.

Coy v. Bank, 5 O. 548; Delveling v. Ferris, 18 O. 170.

³ Lafayette Bank v. McLaughlin, 4 W. L. B. 70.

⁸ Clay v. Edgerton, 19 O. S. 249.

⁴ Fox v. Newell, 8 W. L. J. 421.

⁹ Boyd v. Bank, 33 O. S. 526; Daniel's Negotiable Instruments, sec. 1103; Gove v. Willing, 7 Metc. 212.

⁵ Bashford v. Shaw, 4 O. S. 263; Wolfe v. Brown, 5 O. S. 306; Forest v. Stewart, 14 O. S. 249.

¹⁰ Bank v. McLaughlin, 4 W. L. J. 70.

⁶ Reed v. Evans, 17 O. 128.

¹¹ Powell v. Bank, 1 Dian. 262.

honored, although it is not necessary to state that the indorser is looked to for payment.¹ If the notice shows that demand was made at an improper time, although in fact properly made, but the notice is wrongly dated, an indorser will not be held.² Notice need not be given to more than the first immediate indorser, he having the same time to give notice to those prior to him.³ A party to whom a note is sent for collection is the holder for the purpose of making demand and notice.⁴ Notice may be sent by mail on the day of default, or deposited in the mail directed to the indorser in time for the mail of the next day.⁵ In an action on a bill of exchange, a claim for statutory damages and cost of protest need not be set forth in the petition as a separate and distinct cause of action disconnected from the claim on the bill.⁶

BILLS OF EXCHANGE.

Sec. 301. Action by indorsee or holder against maker, drawer or indorser.—An indorsee or holder of a note or bill which is made payable by indorsement or delivery may institute an action thereon against the maker, drawer or obligor; and after exercising due diligence to obtain the money from the maker, drawer, obligor or acceptor he may bring an action against the indorser.⁷ It is said that in actions by the assignee of a note the petition need only state what is required by the code,⁸ which, as before stated, is that a copy with all credits and indorsements thereon may be given, together with a statement that a specified sum is due and payable.⁹ Some authorities hold that an indorsee should show in his petition that it was payable to the order of the payee, setting out fully the title and indorsement,¹⁰ the most general

¹ *Townsend v. Bank*, 2 O. S. 845.
See *Fox v. Newell*, 8 W. L. J. 421.

² *Spang v. McGary*, 1 W. L. M. 406;
Bank v. Townsend, 2 O. S. 845.

³ *Lawson v. Bank*, 1 O. S. 206.

⁴ *Powell v. Bank*, 1 Disn. 262.

⁵ *Lawson v. Bank*, 1 O. S. 206.
Ordinary and reasonable diligence only being required. *Lawson v. Bank*, *supra*; *Bank v. Townsend*, 2 O. S. 843.

⁶ *Summit Co. Bank v. Smith*, 1 Handy, 575.

⁷ R. S., sec. 8172.

⁸ *Meyers v. Miller*, 2 W. L. M. 420.

⁹ R. S., sec. 5086. See *ante*, sec. 58, 296.

¹⁰ *Jaccard v. Anderson*, 82 Mo. 188;
Rousch v. Duff, 85 Mo. 312; *Bliss on Code Pldg.*, sec. 232.

form of pleading title being to state that the note or bill was made and delivered to the plaintiff, or indorsed or assigned to him,¹ although it is quite immaterial what expression be used, as an allegation that the plaintiff is a *bona fide* holder and owner,² or that he is the lawful owner and holder,³ or that the note was delivered for value received, or that he lawfully came into possession of it,⁴ or that he purchased the same,⁵ have been held sufficient averments as to title. In Ohio, however, it is held that an allegation of title is implied by force of the statute from the statement that there is due the plaintiff a certain amount, and that it is not therefore essential that an indorsee of a note aver extrinsic facts showing his right or title to the paper.⁶ This allegation by an assignee cannot be true unless the party alleging it owns the claim.⁷ While this may be considered a well-settled rule of practice, nevertheless it seems that the better way would be to state all of the facts in the first instance, as shown in the form given.⁸ A petition by an indorsee of a note need not aver the date of transfer, and is not subject to a motion to make definite and certain on that account.⁹ In an action by indorsee against indorser the petition should allege the making and delivery of the note by the maker to the payee and the indorsement of the same by the payee.¹⁰ A person other than a payee who does not give a copy of the indorsement in his petition cannot claim the protection given to a *bona fide* indorsee for value before maturity although the note shows the indorsement thereon by the payee.¹¹ It is not necessary that an indorsee allege that the indorsement was made under the statute;¹² nor is it essential that it be averred that the same was transferred for a valuable consideration, as that is presumed, and any objec-

¹ Mitchell v. Hyde, 12 How. Pr. 460; Appleby v. Elkins, 2 Sand. 673; Bliss on Code Pldg., sec. 233.

² Holstein v. Rice, 15 How. Pr. 1.

³ Reeve v. Fraker, 82 Wis. 243.

⁴ Lee v. Ainslee, 1 Hilt. 277.

⁵ Prindle v. Carruthers, 15 N. Y. 425.

⁶ Sargent v. Railroad Co., 82 O. S. 449, 453.

⁷ Id. 453; Swan's P. & P. 184.

⁸ See post, sec. 314.

⁹ Engeld v. Canfield, 1 Clev. Rep. 196. An averment that the payee assigned the note to plaintiff by indorsement is sufficient. Simpkins v. Smith, 94 Ind. 470.

¹⁰ Maxwell on Code Pldg. 123.

¹¹ Tisen v. Hanford, 31 O. S. 193.

¹² Snedker v. Test, Tap. 112.

tion in that respect is matter of defense.¹ A vendor of a note transferring it by indorsement warrants the signatures of the prior parties even though without recourse.² Nor is it necessary, in actions against persons other than the makers or acceptors, to allege the kind of liability upon which they are sought to be held, but only the facts which create the same.³ In an action by an indorsee of a note secured by mortgage, an allegation that the same has been duly assigned is sufficient, as ownership of the debt necessarily carries with it the security.⁴ In an action by an indorsee against his indorser, the question as to whether or not a blank indorsement was made in the usual course of trade for the purpose of transferring title, and as evidence of a contract, is an issuable fact and may be contradicted; and a parol agreement as to the liability intended to be assumed may be shown.⁵ Recovery may be had against an indorser without recourse even though some of the prior signatures be forged;⁶ so if the indorser had no title, and in some instances if the note be invalidated between the original parties.⁷ In order to hold a remote indorser it is not necessary to show diligence to collect from an immediate indorser.⁸ An indorsee is entitled to recover the full amount of a note from his indorser even though the former paid a sum less than the face of the note.⁹ A maker is not liable on a note in the hands of a *bona fide* holder if he was induced by fraud to sign the same under the belief that it was not a note;¹⁰ and if it be admitted by the pleadings that it was so obtained, a *bona fide* indorsee must show that he received it without notice and in due course of trade.¹¹ If an indorsee has practiced fraud by using an assumed name, a drawer in a suit against

¹ Dumont v. Williamson, 18 O. S. 515.

² Dumont v. Williamson, 18 O. S. 515; 29 Me. 484; 16 John. 201; 20 N. Y. 226.

³ Levy v. Trennell, 5 W. L. B. 793.

⁴ Barthol v. Blakin, 34 Ia. 452.

⁵ Hudson v. Wolcott, 39 O. S. 618; Morris v. Faurot, 21 O. S. 155.

⁶ Dumont v. Williamson, 18 O. S. 515.

⁷ Blethen v. Lovering, 58 Me. 437.

⁸ Pennington v. Hamilton, 50 Ind. 397. And the question of the diligence of the indorsee is one of law, when the facts are not disputed, and when contested one of mixed law and fact. Davis v. Herrick, 6 O. S. 55; Walker v. Stetson, 14 O. S. 89.

⁹ See *ante*, sec. 301.

¹⁰ De Camp v. Hamma, 29 O. S. 467.

¹¹ White v. Francis, 4 Am. Law Rec. 501.

him by a party to whom such indorsee has transferred the bill will be estopped from denying that the legal title thereto is in the plaintiff, or from setting up as a defense fraud practiced by the indorsee,¹ as it is a well-settled rule that a note or bill knowingly made, drawn or indorsed to a fictitious person is regarded as made, drawn or indorsed to bearer and transferable by delivery.² No maker or acceptor, or, if a bill is not accepted, no drawer, of an instrument for the payment of money only, shall be liable in an action thereon, except on a warrant of attorney, in any county other than in the one which he, or one of the joint makers, acceptors or drawers resides or is summoned.³ If in an action on a note against the makers, payee and prior holder, service is made upon the latter in the county where the action is brought, and on the other defendants in a different county, a defense that the plaintiff is not the real owner of the note, but that the note was transferred to the prior holder merely to enable him to bring suit in the county of his non-residence, cannot be raised and determined on a motion to avoid the service or to dismiss the action, as it involves the question of the ownership of the notes, and hence goes to the merits of the action.⁴

BILLS OF EXCHANGE — FORMS.

Sec. 302. Petition by indorsee against acceptor, drawer and indorser.—

Plaintiff says that the defendants are indebted to him upon a certain bill of exchange, the said A. B. as acceptor, the said C. D. as drawer, and the said E. F. as indorser thereof [*omitting if one sued alone*], a copy of which with all credits and indorsements thereon is as follows:⁵ [*Copy of bill.*]

That on the — day of —, 18—, when said bill became due and payable, the same was duly presented to said A. B. and payment thereof demanded, which was refused, and notice thereof was duly and legally given to the said C. D. and E. F., drawer and indorser thereof respectively.

¹ Forbes v. Epy, 21 O. S. 474.

² R. S., sec. 5088.

³ Id. 483; Bolles v. Stearns, 11 Cush. 320; Story on Bills, secs. 56, 200; 8 Hill, 112; 4 E. D. Smith, 88; 595.

⁴ Linney v. Thompson, 44 Kan.

⁵ 6 La. Ann. 624; 2 N. H. 446; 3 Gilman, 637.

⁵ See ante, secs. 57, 58.

Plaintiff therefore demands judgment against said defendants for the sum of — dollars, with interest at — per cent. from —, with \$—, costs of protest and damages.

NOTE.— Where a bill of exchange is made payable to one person and at the time of its execution another signs his name on the back, the latter becomes a party to the request upon the drawee to pay the bill. *Church v. Swope*, 88 O. S. 498. A drawee who pays a bill without funds is entitled to be reimbursed. *Id.*; *Dickerson v. Turner*, 15 Ind. 4; *Swilley v. Lyon*, 18 Ala. 522.

Sec. 303. Petition by acceptor against drawer.—

There is due plaintiff as acceptor, from the defendant as drawer, of a bill of exchange, the sum of \$—, which amount said plaintiff advanced and paid in accepting said draft, without funds to meet the same, a copy of which draft with all indorsements thereon is as follows: [*Copy.*] [*or as in ante, secs. 57, 58.*]

Wherefore plaintiff asks judgment against said defendant for the said sum of \$—, with interest at — per cent. from —.

NOTE.— Acceptor for accommodation may recover amount paid. *Connell v. Finnell*, 11 Ind. 527. This form may answer in almost any action, as it may be varied according to circumstances; the copy incorporated in the petition shows the relation of the parties.

Sec. 304. Petition against maker for non-acceptance.—

[*Caption.*]

Defendant, on the — day of —, 18—, at —, for value received, made his draft or bill of exchange in writing, dated on that day, and directed the same to A. B., requiring the said A. B. to pay to the defendant, — days from the date thereof, the sum of — dollars and interest from the date thereof, and for value the said defendant indorsed the same to the plaintiff [*or, to one L. M., who then and there indorsed the same to the plaintiff*]. A copy of said draft or bill is as follows: [*or as in secs. 57, 58.*]

That the same was duly and in due time presented to the said A. B. for acceptance, and the said A. B. refused to accept the same, and the same was duly protested for non-acceptance thereof, and notice of such presentation and non-acceptance was duly given to the said defendant, and the expense of such protest was the sum of —.

That said defendant has not paid said draft or any part thereof.

Wherefore plaintiff demands judgment, etc.

Sec. 305. Petition showing excuse for non-presentment of bill to drawee.—

[*Caption.*]

Plaintiff alleges that the defendant A. B., on the — day of —, 18—, drew a bill of exchange upon one C. D., whereby

said A. B. requested C. D. to pay this plaintiff or order the sum of — dollars within — days from the date thereof, a copy of which bill is as follows: [*Copy.*]

That at the date of drawing said bill of exchange, and ever since said date, the said C. D. was wholly insolvent and entirely unable to pay said bill, and plaintiff did not present the same to him for acceptance, which would not have been accepted had it been so presented, of all which the defendant had knowledge.

There is therefore due plaintiff from said defendant on said bill the sum of \$—, which he claims with interest from —, for which he asks judgment.

Sec. 306. Petition when demand and notice are waived.—

[*Caption.*]

That on the — day of —, 18—, L. drew his certain bill of exchange on that date, and delivered the same to P., and thereby then and there requested N., — days from the date thereof, to pay P., or order, the sum of — dollars.

That said bill of exchange was duly accepted by said N. O. on the — day of —, 18—.

That at the time of the delivery of said bill of exchange to plaintiff the said defendant waived the presentation thereof to — —, for payment and notice of non-payment thereof, a copy of which bill with the indorsements thereon is as follows:

[*Copy of bill and indorsements.*]

That said bill has not been paid, and there is now due thereon from the defendant the sum of \$—, which he claims with interest from —, 18—.

Wherefore plaintiff asks judgment against said defendant for the said sum of \$—, with interest at — per cent. from —, 18—.

[*Prayer.*]

Sec. 307. Allegation where drawee could not be found.—

[*Caption.*]

On the — day of —, 18—, on which said bill of exchange became due, plaintiff endeavored to find the said E. F., drawee, at —, where said bill was due and payable, that the same might be presented to him for payment, but that said E. F. could not after diligent search and inquiry be found, and said bill was not accepted, but was duly protested, of all which defendant had due and legal notice.

Sec. 308. Petition by drawer against drawee on promise to accept.—

[*Caption.*]

That on the — day of —, 18—, in consideration of [*state consideration*], the defendant promised the plaintiff to

accept and pay at sight a draft thereafter to be drawn by him in favor of E. F., calling for the sum of — dollars.

That on the — day of —, 18—, the plaintiff drew said draft and delivered the same to said E. F., who presented the same on the — day of —, 18—, to said E. F. for acceptance and payment; but said defendant refused to accept or pay the same, in consequence whereof the plaintiff was compelled to pay said draft, with costs of protest, — dollars, and charges in the sum of — dollars, of all which said defendant at the time had notice, and though often requested has failed to pay plaintiff, to his damage in the sum of — dollars.

[*Prayer.*]

NOTE.— Where a letter has been written by one party to another, stating that bills to a certain amount would be accepted if accompanied by bills of lading for shipments, an action may be maintained for a breach of promise to accept, by a third person, who has taken such bills upon the faith of the letter. *Lonsdale v. Bank*, 18 O. 126 (1849). In order to hold a drawee on a promise to accept it must be shown that the bills are drawn in accordance with authority. *Sherwin v. Brigham*, 89 O. S. 187-9. As to such agreements, see *Sherwin v. Brigham*, 2 Clev. Rep. 228.

Sec. 309. Petition on a stolen draft.—

[*Caption.*]

Plaintiff says that on or about the — day of —, 18—, at S., in the state of —, one J. B., being then indebted to the plaintiff, at his request procured from the bank of N. a draft, of which the following is a copy: [*copy*];¹ and then and there inclosed the same in a letter and transmitted the same, properly directed, to the plaintiff, at U., in the said county of W. Plaintiff further says that said letter, and the draft inclosed therein, never came to the plaintiff's possession, but was wrongfully taken from the postoffice by some person to the plaintiff unknown, and without his knowledge or consent; and the person so taking the same, on or about the — day of —, 18—, falsely and knowingly, and without authority from the plaintiff, and without his knowledge or consent, forged and counterfeited an indorsement of the plaintiff's name upon the said draft, and by means of such forged and counterfeited indorsement then and there presented said draft to the defendant, and collected the same, and now holds the money received thereon. Plaintiff has demanded of the defendant the money so received by him to his use as aforesaid, but he refused and still refuses to pay over the same or any part thereof.

Wherefore plaintiff asks judgment against the said defendant.

NOTE.— From *Shaffer v. McKee*, 19 O. S. 526. A maker of a note cannot safely pay it to one who has stolen it from the payee and falsely pretends to hold it for collection. *Nolte v. Hulbert*, 87 O. S. 445; 19 O. S. 526.

¹ See *ante*, *supra* 57, 58.

NOTES — FORMS OF PETITIONS.

Sec. 310. Petition against maker only.—[*Caption.*]

The plaintiff says this his action is founded on a promissory note of which the following is a copy, with all the credits and indorsements thereon: [*Copy of note*], [*or as pointed out in ante, secs. 57, 58.*]

[*Or if no credits.*] There are no credits on said note.

There is due from the defendant to the plaintiff on said note the sum of — dollars, which he claims, with interest from the — day of —, 18—, and for which he prays judgment against the defendant.

NOTE.—See *Sargent v. Railroad Co.*, 32 O. S. 449; *Tysen v. Hanford*, 81 O. S. 193. Where there are two notes embraced in the same petition they should be separately stated as two causes of action. *Van Namee v. People*, 9 How. Pr. 198; *Dorman v. Kellam*, 4 Abb. Pr. 202. A note cannot be brought to immediate maturity through a clause in a mortgage to secure the same authorizing the mortgagee to declare the debt due upon default in any of the provisions of the mortgage. *White v. Miller*, 54 N. W. Rep. 736 (Minn., 1898).

Sec. 311. Petition on note against maker and indorser.—

There is due plaintiff from the defendants, — — as maker, and — — as indorser, the sum of — dollars, which he claims with interest payable annually from —, 18—, on a promissory note, of which the following is a copy with all credits and indorsements: [*Copy.*]

Said note was not paid when due, and due notice of such non-payment was given said indorser, — —.

Wherefore plaintiff asks judgment against defendants in the sum of — dollars, with interest thereon at — per cent. from the — day of —, 18—, and with interest at — per cent. upon the annual instalments of interest from the times at which they respectively became payable and due, and for costs in this action.

NOTE.—From *Mills v. Vollrath*, 27 W. L. B. 36, unreported case.

Sec. 312. Petition against maker and indorsers, averring presentment, etc.—[*Caption.*]

Plaintiff says that there is due from the defendants, — — as maker, and — — and — —, indorsers, the sum of — dollars, which he claims on a promissory note of which the following is a copy, with all credits thereon, to wit [*or, on which there are no credits*]: [*Copy of note.*]

On the — day of —, 18—, the said defendant A. B. indorsed said note as follows: [*Copy of indorsements.*]

On the day said note matured the same was presented to the said defendant, — —, maker thereof as aforesaid, and payment thereof demanded, which was refused, and it was

thereupon protested for non-payment, of all of which the said ———, indorser thereof, had due notice.

[*Or, if diligence was not used against maker:*] That when said note became due said C. D. was and continuously since has been notoriously insolvent, so that an execution against him would have been and is now unavailing.

Plaintiff therefore prays judgment against said defendants for the sum of \$—— with interest from ——.

Sec. 313. Petition against maker, indorser and guarantor.

[*Caption.*]

The plaintiff says that his action is founded on a promissory note of which the following is a copy: [*Copy.*]

On the back of said note are the following indorsements: "Without recourse, D. L. J.;" "I guaranty the payment of the within note, C. Edgerton, or order. Isaac Clay."

The defendant J. H. is liable on said note as maker, and the defendant Isaac Clay as indorser and guarantor. The plaintiff, C. E., is the holder and owner of said note. There is due from the defendants to the plaintiff on said promissory note the sum of —— dollars, which he claims with interest from the —— day of ——, 18——, and for which he asks judgment.

NOTE.— Approved in *Clay v. Edgerton*, 19 O. S. 549.

Sec. 314. Simple form of petition by indorsee of note for value.—

The plaintiff says this his action is founded on a promissory note of which the following is a copy, with all credits and indorsements thereon: [*Copy.*]

The following are all the credits and indorsements thereon: [*Credits and indorsements.*]

The above note was duly assigned and transferred to said plaintiff for a valuable consideration before due.

There is due from said defendants to plaintiff on said note —— dollars, which he claims, with interest from the —— day of ——, 18——, and for which he asks judgment and costs of this suit.

NOTE.— From *Shafer v. Krause*, Supreme Court, unreported. Where a party relies on the rights of a *bona fide* indorsee, an allegation merely that there is a certain sum due the plaintiff is not sufficient; it is necessary that he give a copy of the indorsements relied on. *Tysen v. Hanford*, 81 O. S. 198.

Sec. 315. Petition by indorsee against indorser in case of failure to give notice for want of funds.—

[*Caption.*]

There is due plaintiff from the defendant as indorser the sum of —— dollars, which he claims with interest from —— at —— per cent., on a promissory note made and executed by

C. D., of which the following is a copy with all of the credits and indorsements thereon, to wit: [*Copy of note.*]

That on the — day of —, 18—, the said E. F. indorsed said promissory note in the words following: "Pay to the order of A. B. E. F.," and delivered the same to the plaintiff.

That at the time said C. D. made said promissory note, and from that time until it was presented to him for payment, the said C. D. did not have any funds or effects of E. F. in his hands belonging to E. F., nor had he received any consideration for said note, but made said note at the request of and for the accommodation of said E. F., who is the principal debtor thereon. The said E. F. therefore has not sustained any damage by reason of want of notice of the non-payment of said note by said C. D.

That said E. F. is liable as indorser on said note, no part of which has been paid.

Sec. 316. Petition by purchaser for value against administrator of deceased maker and indorsers of note.—

The plaintiff, A. D. S., for cause of action against the defendants states:

That the defendant, A. B. J., was on the — day of —, 18—, duly appointed and qualified as administrator of the estate of J. A. J., deceased, who died —, by the probate court of — county, Ohio, and that he is still acting as such administrator. That there is due him from the said A. B. J. as administrator of the estate of J. A. J., deceased, who in his life-time was the maker, and from the defendants, A. P. and J. C. S., who were each indorsers of the promissory note, a copy of which hereinafter follows, with all the credits and indorsements thereon, the sum of — dollars, which he claims with interest at six per cent. from —: [*Copy of note.*]

The following indorsements appear on said note: [*Copy of indorsements.*]

"The within note has been duly presented to me for allowance as a claim and debt against the estate of J. A. J., deceased. The same is hereby disallowed and rejected.

" — —, 18—.

A. B. J., Adm'r."

Your petitioner further avers that there are no other or further indorsements on said note and that no payments have been made thereon.

That on the — day of —, 18—, plaintiff presented said note to the defendant A. B. J., as such administrator, with a sworn written statement attached thereto of his claim, and demanded an indorsement of allowance thereon, but defendant A. B. J., as such administrator, refused to make such indorsement and disallowed and rejected the same.

Your petitioner further avers that he became the owner and holder of said note before the same became due in the

usual course of business, and that he paid a valuable consideration therefor.

Wherefore plaintiff prays judgment against A. B. J. as administrator of the estate of J. A. J., deceased, and the defendants A. P. and J. C. S., the indorsers of said note, for the sum of — dollars, with interest at — per cent. from —.

NOTE.—From *Seward v. Jones*, 27 W. L. B. 247. Where the maker of a note dies before maturity the presentment and demand must be made to his executor or administrator. *Huff v. Ashcraft*, 1 Dian. 277. A purchaser for value before maturity, without knowledge of anything to impeach its validity, may recover the amount of note, though obtained by payee of maker by fraudulent means. *Kitchen v. Loudenback*, 48 O. S. 177. To constitute a defense, proof must show that he acted in bad faith. *Id.*; *Johnson v. Way*, 27 O. S. 374.

Sec. 317. Petition by payee of note against executor.—

[*Caption.*]

On the — day of —, 18—, said J. L. died, leaving a will, whereby he appointed said defendant J. L., Jr., sole executor thereof, which will was, on the — day of —, 18—, duly admitted to probate in the probate court of — county, Ohio, and letters testamentary were, on the — day of —, 18—, by said court, duly issued thereon to the defendant, who thereupon qualified and entered on the duties of such office.

The defendant as such executor is indebted to the plaintiff on a promissory note of which the following is a copy, with all the indorsements thereon: [*Copy.*]

Said note is indorsed as follows: [*Copy of indorsements.*]

There are no credits on said note; and there is due to the plaintiff thereon from the defendant, as executor, the sum of — dollars, which he claims with interest thereon at — per centum per annum from the — day of —, 18—.

On the — day of —, 18—, the plaintiff duly presented to the defendant as such executor a written statement of his said claim, and demanded an indorsement of its allowance thereon, but the defendant refused said allowance and indorsement, and wholly rejected said claim.

Wherefore the plaintiff asks judgment against the defendant for the sum of — dollars, with interest on — dollars at the rate of — per centum per annum from the — day of —, 18—.

NOTE.—From *Lillie v. Bates*, 8 O. C. C. 94. As to objections to consideration of a note by heirs, see *Nye v. Lathrop*, 94 Mich. 411.

Sec. 318. Petition by indorsee against indorser without recourse who warranted a forged indorsement.—

[*Caption.*]

Plaintiff says that H. E., on the — day of —, 18—, at O., Ohio, made his promissory note in writing of that date.

and thereby promised to pay to the order of W. W. — dollars, for value received, in four months after the date thereof, and which said promissory note purports to be indorsed on the back thereof by W. W., which said note afterwards came into the hands of the defendant, who then and there indorsed and delivered the same to plaintiff, but without recourse on him, a copy of which note with all the credits and indorsements thereon is as follows: [*Copy.*]

Plaintiff avers that the defendant did thereby warrant that the indorsement on the back thereof was the genuine signature of W. W. and was made by him, whereas in truth and in fact said signature on the back of said note was not made by said W. W., but was and is forged, and by reason thereof said note was wholly worthless and of no value, the said H. E., the maker thereof, being wholly insolvent. Plaintiff further says that when said note matured the same was presented to the said defendant, — —, maker thereof, and payment thereof demanded, which was refused, and due notice thereof given to the said defendant. There is due from said defendant upon said note the sum of — dollars.

Wherefore plaintiff prays judgment for the sum of — dollars, etc.

NOTE.— Approved in *Dumont v. Williams*, 18 O. S. 515.

§ 319. Petition by bank as assignee for value on note of corporation.—

The plaintiff for its petition herein says:

That it is a national banking association duly organized under the laws of the United States of America; that the said defendant, the Himrod Furnace Company, a corporation duly organized under the laws of the state of New York, did, on the — day of —, 18—, execute and deliver to one R. A. W. its certain promissory note in writing of that date, a copy of which, with the indorsements thereon, is in the words and figures following, to wit: [*Copy of note.*]

That said R. A. W. did then and there indorse and deliver said promissory note to this plaintiff, who is now the owner and holder thereof.

That there was paid on said note, on the — day of —, 18—, the sum of — dollars.

That afterwards, on the — day of —, 18—, said plaintiff did request said defendant to pay to it the sum of money then remaining due upon said note, yet the said defendant did not pay, nor has it since paid, the same nor any part thereof.

Plaintiff says that there is now due it on said note from said defendant the sum of — dollars.

NOTE.— From *Iron City Nat. Bank v. Himrod Furnace Co.*, Supreme Court, unreported.

Sec. 320. Petition on note wrongly dated.—

Plaintiff says that on the — day of —, 18—, the defendant made his promissory note in writing bearing date by mistake on the — day of —, 18—, when in fact said promissory note was, at the time of making the same, intended by the plaintiff and defendant to be dated on the — day of —, 18—, and delivered said note to plaintiff, a copy of which, with all credits and indorsements thereon, is as follows: [*Copy.*]

There is due plaintiff from said defendant on said note the sum of — dollars, which he claims with interest at — per cent. from the — day of —, 18—.

[*Prayer.*]

NOTE.— A note by mistake wrongly dated, received by holder when apparently overdue, though not in fact, the title otherwise being perfect, is not, on account of the date, subject to the equities between the original parties. *Dennison v. Jessup*, 1 *Dian.* 580. Where a bill is post-dated or ante-dated, the date of its issue determines its maturity, and parol evidence is inadmissible to fix day of issue. 4 *Lawson's R. & R.*, sec. 1467, and cases. It is immaterial on what part of the note the date is placed. *Sheppard v. Graves*, 14 *How.* 505.

Sec. 321. Petition for instalment due on note.—

[*Caption.*]

Plaintiff says that the defendant made and delivered to him a promissory note of which the following is a copy with all credits and indorsements thereon, to wit [*or, upon which there are no credits or indorsements*]: [*Copy.*]

That there is due plaintiff from defendant the sum of — dollars, being the — instalment on said note, which became due and payable on the — day of —, 18—, which he claims with interest from the — day of —, 18—.

[*Or, The provisions of said note were such that, if default be made in the payment of any one instalment when the same became due, then the whole amount thereof should become due and payable. That on the — day of —, 18—, the — instalment on said note became due and payable, which the defendant has wholly failed to pay, whereby the whole amount of said instalment has become due and payable.*]

Wherefore he asks judgment against said defendant for said sum of — dollars with interest from the — day of —, 18—.

NOTE.— Where a note is payable in a series of instalments, and it is provided that a less sum would be accepted in full payment if each instalment is punctually paid, the larger sum is in the nature of a penalty, and payment of the lesser sum discharges the obligation even though there be default in paying the instalment. *Longaworth v. Askne*, 15 *O. S.* 870. If interest on a note be payable in instalments, and there is a provision that upon default of any instalment it shall become due and payable, it matures on the first default, and indorsers thereon are discharged if demand and notice of non-payment is not given. *Mallon v. Stevens*, 6 *W. L. R.* 69. A person purchasing a note payable in instalments after default as to one instalment takes it subject to the equities between the original parties. *Vinton v. King*, 4 *Allen*, 562.

Sec. 322. Petition for interest due on note.—

[*Caption.*]

That the defendant is indebted to the plaintiff in the sum of \$—— for the —— instalment of interest now due on a certain promissory note executed and delivered by the defendant to the plaintiff on the —— day of ——, 18——, for the sum of \$——, with interest at —— per cent., payable annually, a copy of which note, with all the credits and indorsements thereon, is as follows: [*Copy.*]

That no part of said interest has been paid, and there is now due thereon from the defendant to the plaintiff the sum of \$——, which he claims with interest from —— —, 18——.

Wherefore plaintiff asks judgment for said sum of \$——.

NOTE.—An action may be maintained to recover interest. *Robbins v. Cheek*, 82 Ind. 828; *Marks v. Trustees*, 56 Ind. 288.

Sec. 323. Petition on notes and to correct error in an accounting thereon.—

The plaintiff says:

1st. This his first cause of action is founded upon a promissory note of which the following is a true copy: [*Copy.*]

2d. There are no credits on said note.

3d. There is now due the plaintiff from said defendant the sum of \$——, which he claims with interest from —— —, 18——, for which plaintiff prays judgment against defendant.

Second cause of action:

1st. Plaintiff avers that his second cause of action is also founded upon a promissory note of which the following is a true copy. [*Copy.*]

2d. There are no credits on said note.

3d. The plaintiff further says that on the —— day of ——, 18——, the plaintiff and defendant had a mutual accounting on two certain promissory notes, one of said notes bearing date —— —, 18——, for \$——, with —— per cent. interest, and upon which note last named there were numerous credits, and during the progress of said calculation there arose a dispute as to whether the note sued upon in this second cause of action should also be credited on said \$—— note of said date above set forth, in addition to the cash credits made thereon, and thereupon plaintiff and defendant agreed that said note of \$—— herein sued upon should be credited on said \$—— above named, but said agreement was made with the distinct understanding and mutual consent of both plaintiff and defendant that should it turn out that said defendant was not entitled to be credited with said amount of said note of \$——, the said accounting was to be opened up and a new accounting made and the mistake corrected, and that the defendant execute to the plaintiff his promissory note for whatever the amount of

the mistake should aggregate; and thereupon on said — day of —, 18—, the said plaintiff handed over to said defendant said note of \$— herein sued upon, with some other papers. Plaintiff avers that there was a mistake in said mutual calculation in the sum of \$—, with — per cent. interest on the same from — —, 18—, and that said mistake was discovered within one week after said calculation was made, and that he then and there notified the defendant of said mistake and requested him to correct the same, in pursuance of their said arrangement and agreement, but the defendant then and there neglected and refused to comply with his part of said mutual agreement, and has ever since refused and still refuses to correct said mistake or pay to the plaintiff said sum of \$—, with the interest thereon.

4th. There is now due the plaintiff from said defendant the sum of \$—, with — per cent. interest on same from — —, 18—.

5th. Wherefore plaintiff prays judgment against said defendant on amounts set forth in the first and second causes of action herein in the sum of \$—, with interest, etc.

NOTE.— From *Edwards v. Griffiths*, 48 O. S. 664.

Sec. 324. Petition by partnership against partners as makers and indorsers.—

[*Caption.*]

Plaintiff is a partnership formed for the purpose of carrying on business in the state of Ohio.

Defendants are each a partnership formed for the purpose of carrying on business in the state of Ohio.

There is due plaintiff on a promissory note from the said J. R. and W. I., partners as R. I. & Co., as makers, and said H. C. B. and H. H. N. as indorsers, defendants, the sum of — dollars, which he claims with interest from —, a copy of which note with all credits and indorsements is as follows:

[*Copy.*]

Said plaintiff further says that said note was duly presented for payment to the makers at maturity, which was refused, and notice of non-payment was duly given to said indorsers.

Wherefore said plaintiff prays judgment against said defendants in the sum of — dollars, with interest from —.

NOTE.— From *Slevin v. Reynolds*, 1 Handy, 878. See, also, *Ohio Ins. Co. v. Goodin*, 1 Handy, 81.

Sec. 325. Petition by surviving partner against a firm on note.—

[*Caption.*]

Plaintiff says that he is the surviving partner of the firm of A. B. & Co., late a partnership formed for the purpose of doing business in the state of Ohio.

That the defendants are a partnership formed for the pur-

pose of carrying on business in the state of Ohio; that on the — day of —, 18—, said defendants, in their firm name, made and delivered to the plaintiff and one C. D., then a partnership formed for the purpose of doing business in the state of Ohio, a promissory note of which the following is a copy with all credits and indorsements thereon, to wit: [*Copy.*]

There is due thereon from the said defendants to the plaintiff as such surviving partner the sum of — dollars, with interest from the — day of —, 18—.

Wherefore plaintiff asks judgment.

NOTE.—The existence of a partnership must be specifically averred. *Bischoff v. Blease*, 20 S. C. 460.

Sec. 326. Petition by payee against surviving partner on note.—

[*Caption.*]

Plaintiff says that defendant is the surviving partner of A. B. & Co., late a partnership formed for the purpose of carrying on business in the state of Ohio. That there is due plaintiff from defendant, as such surviving partner, the sum of — dollars, on a promissory note, which he claims with interest from the — day of —, 18—, of which the following is a copy, with all the credits and indorsements thereon, to wit: [*Copy.*]

Wherefore plaintiff prays judgment against the said defendant as such surviving partner for said sum of — dollars, with interest from —.

Sec. 327. Actions on lost, destroyed or stolen instruments, with form of petition.— Before the adoption of the code it was held that an action at law could be maintained by the owner of negotiable paper which had been lost after it fell due, without requiring indemnity, when the circumstances were such that it could not be produced for payment a second time; but if lost before due, recovery cannot be had until complete indemnity is furnished against a possibility that the note would be presented for payment. The reason of the rule is apparent, because if lost after due it will be charged with all the equities against the original holder, but if lost before due there is a possibility that it may be outstanding in the hands of an innocent holder. Hence, if suit be brought on a note lost before due, the remedy is in equity, where indemnity may be required.¹ It would seem, therefore, that as the

¹ *Mowry v. Mast*, 14 Neb. 510; *Thayer v. King*, 15 O. 242; *Story's Eq.*, sec. 86.

code affects only forms and not rights, this question would be settled upon the same principles as before the adoption of the code.¹ It has been held that, where a note has been accidentally destroyed, suit may be maintained thereon without indemnity.²

It is considered unnecessary, in framing a petition on a destroyed note, to aver the destruction thereof when a copy is incorporated in the petition, and that an ordinary form of petition will be sufficient. At common law a petition which did not aver title was clearly defective; but under the code such a defect may be supplied by implication from the ordinary averments.³ It is not usual or regarded as necessary to declare specially in an action on a lost note that the same has been lost.⁴ The better course, however, would seem to be to frame a petition so that a court will not be compelled to supply any necessary facts by implication. A note partly destroyed may be declared on as entire, and it is not necessary that the fact be set out in the petition.⁵ Recovery may be had upon a draft drawn upon a bank by the payee thereof against the one who procured the same, although it is stolen from the mails and transferred by a forged indorsement to an innocent person who drew the money.⁶ The giving of a bond of indemnity in an action against the maker of a note is said to be essential only when negotiable.⁷ It has been suggested, however, that the better practice in such cases is to tender indemnity before suit and allege the same in the petition, although such a course is not absolutely necessary.⁸

While it has been generally considered that the ordinary form

¹ *Lamson v. Pfaff*, 1 Handy, 450.

² *Arts v. Leggett*, 16 N. Y. 582; *Blandon v. Wade*, 20 Kan. 251.

³ *Sargent v. Railroad Co.*, 32 O. S. 449.

⁴ *Viles v. Moulton*, 11 Vt. 470.

⁵ *Duckwall v. Weaver*, 2 O. 18-16.

⁶ *Shaffer v. McKee*, 19 O. S. 526. See form of petition in this case.

⁷ *Wright v. Wright*, 54 N. Y. 487; *Frank v. Wessels*, 64 N. Y. 155. See, also, *Randolph v. Harris*, 28 Cal. 561.

⁸ *Randolph v. Harris*, 28 Cal. 561.

The court may stay execution until indemnity is furnished (*Biesbing v. Graham*, 14 Pa. St. 14), as the parties liable are entitled to the surrender of the note before payment. It is unnecessary to furnish indemnity when the note is clearly shown to have been destroyed, or when it appears that the defendant is protected by the statute of limitations. *Daniel's Neg. Inst.*, sec. 1481.

of petition on a note is sufficient for an action on a lost note,¹ the following form is given as a special declaration upon a lost note by an indorsee against the maker:

Plaintiff says that on the — day of —, 18—, the defendant A. B. made and delivered to E. F. a promissory note for the sum of — dollars, a copy of which, with all credits and indorsements thereon, is as follows: [*Copy.*]

That thereafter and before the same became due the said E. F. indorsed said note to this plaintiff, and that before the same became due, and without any neglect on the part of this plaintiff, it was lost and cannot be found, although diligent search has been made therefor. That said note was not indorsed by this plaintiff, and that at the maturity thereof plaintiff tendered to defendants a good and sufficient bond, payable to them, and signed by plaintiff as principal and C. D. as surety, with a penalty of — dollars, conditioned that plaintiff would save and keep defendant harmless against all suits or claims made by any person who might have obtained possession thereof, and has thereupon demanded payment, which was refused, and said note is now due and unpaid.

Plaintiff therefore brings said bond into court for the use and benefit of the said defendants.

Wherefore plaintiff prays judgment against said defendants, etc.

DEFENSES.

Sec. 328. Answers to actions on notes and bills — General rules.—Where a defendant relies upon fraud as a defense, the facts constituting the same must be fully set forth.² An answer alleging that a note was obtained by fraud, misrepresentation and connivance, specifically setting forth the facts, presents an issue to which a reply must be made; and so when an answer states that a note was executed without consideration.³ The alleged fraud must extend to the whole note.⁴ The rule is otherwise where usury is claimed as a defense.⁵ A defendant may claim that he did not execute a note, or that if his signature thereto be genuine, it was obtained by fraud, or that it was without consideration.⁶ An answer alleging a spe-

¹ Bates' Pldg., sec. 817.

² Lefler v. Field, 52 N. Y. 621; Gifford v. Carville, 29 Cal. 589; McComas v. Haas, 98 Ind. 280; Wilder v. De Cou, 18 Minn. 470. See sec. 607, *post*.

³ Evans v. Stone, 80 Ky. 78.

⁴ Harland v. Read, 8 O. 285.

⁵ Selser v. Brock, 8 O. S. 302.

⁶ Citizens' Bank v. Closson, 29 O. S.

78.

of the sum due upon a note, claiming payment in full, is an allegation of new matter, which will be taken as true in the absence of a reply;¹ and an answer which states that a note was never protested states a good defense as to the cost of protest.² A denial that the plaintiff is the owner of a note or bill, and that it was not received in due course of trade, is a good defense.³ In an action against makers and indorsee, one of the defendant makers cannot urge in support of a demurrer to the petition that there are other defendants joined with him as to whom the facts stated in the petition are not sufficient;⁴ nor can a defendant show that a note is forged under an answer which merely avers that "the defendant denies the allegation of the petition." He must set out in his answer, in a substantial manner, his whole defense.⁵ Nor is an allegation that a note is "not outstanding against the maker," and that there is nothing due, proper,⁶ as it is a mere conclusion, embodying no matter of fact, and as a pleading has no legal effect.⁷ If it be alleged as a defense that a note is wholly without consideration and void, and the plaintiff joins issue without requiring a statement of facts, evidence tending to impeach or sustain the consideration may be admitted.⁸ The maker of a note may, as a defense to an action on the note, show that it was founded on an illegal agreement, even though he is *in pari delicto*.⁹ An answer relying on the illegality of the contract between the original parties should ordinarily contain a statement affecting the title of plaintiff, but may be aided by a petition which contains facts from which it may be inferred that plaintiff was not a *bona fide* holder, as against a demurrer.¹⁰ An answer merely alleging that the defendant has compromised a note sued upon, without stating the facts constituting the alleged compromise, is insufficient;¹¹ and a person capable of reading, who signs a note without reading it or knowing what he is signing, cannot be heard

¹ Fewster v. Goddard, 25 O. S. 276.⁷ Bank v. Lloyd, 18 O. S. 353.² Bartlett v. Jones, 1 Clev. Rep. 219.⁸ Chamberlain v. Railroad Co., 15 O. S. 325.³ Louisville Banking Co. v. McDonald, 1 Clev. Rep. 178.⁹ Jacobs v. Mitchell, 40 O. S. 602.⁴ Slevin v. Reynolds, 1 Handy, 87.¹⁰ Gebhardt v. Sorrels, 9 O. S. 461.⁵ Houser v. Metzger, 1 C. S. C. R.¹¹ Mitchell v. Freedly, 126 Ind. 545.

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See *ante*, sec. 146, form.⁶ Larrimore v. Wells, 29 O. S. 13.

to deny its execution as against a purchaser.¹ An accommodation drawer of a bill made payable at a particular bank cannot be held liable thereon to a third person after discount has been refused by the bank for value; nor can he be held liable if the bank subsequently discounts it for a third party: such facts, to be available by the drawer, must be pleaded by him.² In an action brought by an agent holding a note for collection merely, a defendant may make such defense thereto as he might have made in an action by the owner.³ While a person cannot set up his own neglect to defeat an innocent person,⁴ yet, where the parties to a note founded on fraud are *particeps criminis*, the defendant may prove the fraud and defeat recovery.⁵ As against a *bona fide* holder it is no defense that a note has been fraudulently diverted from the purpose for which it was given.⁶ An answer by an indorsee alleging that the indorsement was for the accommodation of the plaintiff and prior indorsee, without consideration, and that the prior indorser received the only consideration which passed, which was the taking up of a prior note between the same parties, indorsed by the plaintiff, sufficiently sets forth an accommodation indorsement.⁷ It has been held to be a good defense that a note was given for furniture which was to be used in a house of prostitution.⁸

It is provided by statute in some states that corporations of a sister state must file a statement of their capital stock, the kind of business transacted, and appoint a general agent upon whom service of process can be made, if they have no general office within the state, and also file a sworn copy of their articles of corporation with the secretary of state or other officer, and procure a certificate authorizing them to do business, before they can maintain an action.⁹ In an action by an indorsee of a note before maturity against the maker, an answer which alleges that the payee is an agent of a foreign corporation which has not complied with a statute requiring

¹ Winchell v. Crider, 29 O. S. 480.

² Knox Co. Bank v. Lloyd, 18 O. S. 353.

³ Saulsbury v. Corwin, 40 Mo. App. 373.

⁴ Goudy v. Gebhardt, 1 O. S. 262.

⁵ Bradford v. Beyer, 17 O. S. 339.

⁶ Bank v. Hall, 44 N. Y. 395; Bank v. Watson, 42 N. Y. 490.

⁷ Sims v. Frill, 1 Clev. Rep. 337.

⁸ Burns v. Seep, 4 W. L. B. 1067.

⁹ See sec. 990.

such agent to file their authority with the proper officer as a condition precedent to their doing business within the state, which does not allege that the assignment was merely colorable and to avoid the statute, is insufficient and subject to demurrer.¹

Sec. 329. Defense when indorsed or delivered before maturity.—In an action by an indorsee on a note or bill indorsed or delivered on or before the day of maturity, a defendant may prove payment thereof before such indorsement, if the plaintiff had notice of such payment before he received the paper.² While a *bona fide* holder is protected against defenses which might be made by the maker against the original payee, yet he must use ordinary care to prevent the transaction from operating to the prejudice of others. It is incumbent on a person claiming under one who has been guilty of positive fraud to show that he has acted honestly and without knowledge of the fraud.³ Paper which has been transferred before due to a creditor in payment of a debt cannot be impeached in his hands on the ground that the maker of the note procured an accommodation indorsement on it, unless the creditor had knowledge of the fraud.⁴ One who has obtained notes before maturity for value, with notice that they have been obtained by fraud, cannot be estopped from showing that the maker had before purchase informed him that the notes were all right, and would be paid at maturity, if at the time of the making of such statements the maker was ignorant of the fraud.⁵

Sec. 330. Defense when indorsed or delivered after due. As against an indorsee of notes and bills which have been indorsed after maturity, a defendant may set up any defense which he might have made as against the original holder;⁶ and as against such indorsee a maker may show that he is not the real party in interest.⁷

¹ Zink v. Dick, 27 N. E. Rep. 623 (Ind., 1891).

² R. S., sec. 8174.

³ McKesson v. Stanberry, 3 O. S. 41 O. S. 403.

156; Monroe v. Cooper, 5 Pick. 412; Woodhull v. Holmes, 10 John. 280.

⁴ Kingsland v. Pryor, 38 O. S. 19.

⁵ Sackett v. Kellar, 22 O. S. 554.

⁶ R. S., sec. 8173; Baker v. Kinsey.

⁷ Osborn v. McClelland, 43 O. S. 284.

Sec. 331. Defenses — Failure of consideration.— As a negotiable instrument imports consideration,¹ it is therefore incumbent on him who questions it to plead and prove failure therein.² It may be questioned between the original parties,³ but not as against a *bona fide* purchaser for value before maturity.⁴ If attacked between the original parties, the answer should contain a statement affecting the title of the holder, although a defendant is entitled to the benefit of any inferences which may be drawn from facts stated in the petition;⁵ or if the petition shows the consideration it need not be alleged in the answer.⁶ In pleading want of consideration, as a general rule, it is essential that the fact be substantially set forth; it cannot be shown under a general denial,⁷ although it may sometimes be pleaded in general terms.⁸ If a defendant pleads want of consideration in general terms, and the plaintiff, without requiring a statement of the facts, joins issue, any evidence is admissible which tends to impeach or sustain it.⁹ An answer alleging that a note was obtained by fraudulent representations, without stating what the representations were, is not good.¹⁰ If an answer claims that there is no consideration and that the note was fraudulently transferred, the plaintiff must then show that he received it for value;¹¹ and it should be averred that the plaintiff had full knowledge of the fraud.¹²

¹ *Ante*, sec. 297.

² Long v. Spencer, 78 Pa. St. 303; James v. Chalmers, 6 N. Y. 209; Trustees v. Hill, 12 Ia. 462; Sawyer v. Vaughn, 25 Me. 387; Brown v. Kinsey, 81 N. C. 245.

³ Eastman v. Shaw, 65 N. Y. 522; Patten v. Pearson, 55 Me. 39.

⁴ Rahm v. Bridge Co., 16 Kan. 530; Bank v. Chapin, 8 Metc. 40; Matthews v. Crosby, 56 N. H. 21.

⁵ Gebhardt v. Sorrels, 9 O. S. 461.

⁶ Tyler v. Borland, 17 Ind. 298.

⁷ Frybarger v. Cockefair, 17 Ind. 404; Moss v. Western Printing Press, 64 Ind. 125; Swope v. Fair, 18 Ind. 300; Dubois v. Hermance, 56 N. Y. 673; Billan v. Hercklebarth, 23 Ind. 71; Hunter v. McLaughlin, 43 Ind. 38; Smith v. Flack, 95 Ind. 116;

Hammond v. Enle, 58 How. Pr. 426; Moore v. Alston, 17 S. W. Rep. 1117 (Tex. App., 1891); Herman v. Gray, 79 Wis. 182. Where consideration is denied, the plaintiff should sustain his case by producing the note. Langhorst v. Dodlee, 5 W. L. B. 938.

⁸ Beard v. Lofton, 102 Ind. 408. See Evans v. Stone, 80 Ky. 78. A general answer of no consideration has been held sufficient. Swope v. Fair, 18 Ind. 300; Evans v. Williams, 60 Barb. 346.

⁹ Chamberlain v. Railroad Co., 15 O. S. 225.

¹⁰ Catlin v. Horne, 84 Ark. 169.

¹¹ Davis v. Bartlett, 12 O. S. 564.

¹² Weissenagle v. Powers, 1 Clev. Rep. 141.

Partial failure of consideration will not bar the action by contradicting the terms of the note, but may be shown as a defense only to the extent of injury sustained thereby by way of recoupment for damages or abatement of plaintiff's claim.¹ The defense of illegality of consideration is placed upon the same footing, and the facts must be specifically set forth and cannot be shown under an answer of no consideration.² A denial of the execution of a note and also a claim of want of consideration may be made in the same answer.³

ANSWERS — FORMS — BILLS.

Sec. 332. Answer of unauthorized acceptance.—

[Caption.]

That the bill mentioned in the petition was accepted without the authority or consent of the defendants, out of the course of their regular business, and without consideration to them, in their name by one C. D., who then and there fraudulently pretended to act under their authority, but in fact having no authority to accept the same.

Sec. 333. Answer of payment before indorsement.—

[Caption.]

That after the bill mentioned in the petition was due, and while the said [drawer] was the holder thereof, and before this action was brought, this defendant paid the same in full to said [drawer], and after said payment, and not before, said [drawer] indorsed said bill to the plaintiff.

NOTE — An indorsement of payment being regarded as *prima facie* true, the burden of proof is on him who disputes it. *Kline v. Prindle*, W. 444. Where a note or bill is made payable to several persons who are not in partnership, an indorsement of payment by one will not therefore bind the other payees; neither can transfer the contract by his individual indorsement. *Conahan v. Smith*, 2 Disn. 13.

Sec. 334. Answer of acceptance for accommodation of plaintiff.—

[Caption.]

That he accepted the bill set forth in the petition for the sole accommodation of the plaintiff, and that there was no

¹ *Holzworth v. Koch*, 26 O. S. 33; *Lyts v. Keevey*, 32 Pac. Rep. 584; *Black v. Ridgeway*, 131 Mass. 80; (*Wash.*, 1893); *Bliss on Code Pldg.*, *Morgan v. Fallenstein*, 27 Ill. 31; sec. 330; *Gushee v. Leavitt*, 5 Cal. 160; *Petillo v. Hopson*, 23 Ark. 196; *Moore v. Boyd*, 95 Ind. 134. *Finley v. Quirk*, 9 Minn. 194. See *Buller v. Edgerton*, 15 Ind. 15; *Evans*

² *May v. Burras*, 13 Abb. N. C. 384; *Mathews v. Leaman*, 24 O. S. 615; *Railroad Co. v. Miller*, 3 Minn. 661; *Holdridge*, 50 Ind. 529.

³ *Pavey v. Pavey*, 30 O. S. 600.

value or consideration for the acceptance or payment thereof by this defendant.

NOTE.—It cannot be urged as a defense in an action against the acceptor of a draft that the same was accepted for the accommodation of the drawer (Davis v. Randall, 115 Mass. 547; s. c., 15 Am. Rep. 146); nor that he signed the bill to enable the party to raise money and he used it to pay a debt, Comstock v. Hier, 29 Am. Rep. 142; Felters v. Bank, 7 Am. Rep. 225. In the absence of an understanding to that effect, drawers and acceptor are not co-sureties for the payees or liable to contribution. Barnett v. Beall, 29 O. S. 7. See Williams v. Bosson, 11 O. 62. An accommodation indorser may make any defense which the maker could. Sawyer v. Chambers, 44 Barb. 42. There must be a valuable consideration to make the writer of a letter of credit liable upon an implied acceptance or an agreement to accept. Sherwin v. Brigham, 39 O. S. 137.

ANSWERS — FORMS — NOTES.

Sec. 335. Answer denying obligation as maker, claiming that of accommodation indorser.—

[*Caption.*]

Defendant says that when the note was executed he refused to assume the obligations of a maker, but did assume the obligation of an indorser, and only those of an indorser, and accordingly wrote his name on the back of the note as such indorser, without any other consideration than that of accommodating L., all of which the original parties to the whole note knew.

Wherefore he prays to be dismissed, with his costs.

NOTE.—From Seymour v. Seymour, 10 O. S. 235.

Sec. 336. Answer of indorser setting up verbal agreement as to indorsement.—

That before said note became due and payable said E. P., the payee thereof, indorsed said note in blank, and delivered the same to this defendant, and this defendant indorsed and delivered the same to the Society for Savings, for collection only. That he never placed his name on the back of said note with the intention of becoming liable on the same in any manner whatever. That on or about the — day of —, 18—, he sold and delivered said note to said plaintiff, and it was then expressly agreed and understood by and between plaintiff and this defendant that this defendant should not indorse said note or be liable thereon as an indorser. That this defendant at that time intended to erase his name from said note, which he neglected to do.

NOTE.—From Hudson v. Wolcott, 39 O. S. 618.

Sec. 337. Answer denying execution and setting up want of consideration — A mere gift.—

For answer and defense in this case the said A. B. J., as administrator as aforesaid, says:

1. That he denies that the said J. A. J. made or delivered

the promissory note in the petition mentioned, and prays judgment.

2. That if the signature of said J. A. J. to said note was the genuine signature of decedent, the said note was wholly without consideration, and was not delivered to the alleged payee thereof until after the death of decedent, or at all, and the same was a mere gift, if the same was ever delivered; and defendant further says that the said J. O. S. and the said plaintiff were not, nor was, nor is, either of them, the *bona fide* holder for value of said note, and are not entitled to recover thereon, and defendant therefore prays judgment.

NOTE.—Pleading alternative defense is proper. *Bank v. Clossen*, 29 O. S. 78. See *ante*, secs. 21, 22. Defendants proving want of consideration and fraudulent transfer of note, it is incumbent on plaintiff to show that he received the note for valuable consideration. *Davis v. St. John*, 12 O. S. 534.

Sec. 338. Answer that note was purchased with notice that it was mere accommodation paper.—

Defendant says that if said promissory note in the petition described was executed and indorsed in manner and form as in the petition alleged, the same was made, executed and delivered for the individual purposes and accommodation of R. A. W., who, the defendant avers, is the identical person as R. A. W. whose name it is in the petition alleged appears thereon as having signed the name of this defendant as maker of said promissory note, and as an indorser thereon, and not in any business transaction connected with the management of defendant's affairs. The defendant further avers that at the time the plaintiff purchased said promissory note, if it purchased it at all, it well knew the same to be mere accommodation paper, executed, indorsed and delivered for the individual purposes and benefit of the said R. A. W., and that no consideration therefor moved to the defendant from the plaintiff, nor from any person or source whatsoever, and that this defendant had no power in law to issue such accommodation paper, and that the said R. A. W. had no authority from this defendant to execute the same.

In consideration of the facts stated in its two foregoing defenses, the defendant says it is not indebted to the plaintiff in the sum claimed in the petition nor in any other amount whatsoever, and prays the court to be hence dismissed with its costs.

Sec. 339. Answer that consideration failed by reason of failure of title to property.—

[Caption.]

That the promissory note set forth in said petition was given for —, which the plaintiff sold and delivered to the defendant, and for no other consideration whatever.

That the plaintiff had no title to said — at the time he

sold and delivered the same to the defendant, but it was the property of R. F., who on the — day of —, 18—, claimed said property and recovered the same in an action of replevin.

That the defendant has therefore received no consideration for said note.

Sec. 340. Answer that note was given for gambling.—

That before the making of the said promissory note set forth in said petition, the said plaintiff and the said defendant played together at a game called, etc., for divers sums upon credit, and not ready money; and the said plaintiff at said game won of the said defendant, and the said defendant then and there lost, the sum of — dollars, whereof no part was then and there paid by the said defendant to the said plaintiff; and afterwards, to wit, on the — day of —, 18—, the said defendant gave and made to the said plaintiff the afore-said promissory note for the said sum of money so lost by the said defendant and won by the said plaintiff at the said game, and for no other consideration whatever, by reason whereof the said note is void in law.

Sec. 341. Answer that consideration was for a patent-right.—

That the plaintiff purchased said note on or about the — day of —, 18—, and after said note had become due.

That said note was made and delivered by the defendant to R. F. in consideration of a certain patent-right for a pretended improved buggy spring which said R. F. represented was a new and valuable improvement in buggy springs, and of the value of \$—, and the defendant, relying upon said representations, purchased said patent-right of said R. F. and made and delivered to him the note in question, the sole consideration therefor being said patent-right.

That said patent-right was void for want of novelty, and no improvement whatever on former methods of preparing buggy springs, as said R. F. well knew at the time of said sale, and was of no value whatever, and the defendant has received no consideration for said note.

NOTE.— R. S., sec. 8178. A useless patent is not a good consideration. *Fallis v. Griffith*, W. 808.

Sec. 342. Alteration of notes.— Where a note is signed in blank, with marginal figures indicating the amount for which it is to be filled, and the party to whom it is indorsed alters the figures, the simple fact of alteration does not vitiate the note, although the person so signing the blank note is a surety and known to the payee to have signed it as such.¹ A blank

¹ *Schryver v. Hocks*, 23 O. S. 808.

signature has the effect of a general letter of credit; and when a person intrusts a note to another to fill in the amount, he is liable to the amount that may be inserted, even though there be a private agreement between the signers that the same is to be an amount certain;¹ and where a note, complete excepting the stipulation as to interest, is altered by the principal maker, before its delivery, by the addition of the rate of interest, it is such a material change as will relieve the surety;² and so is the alteration of the date of a note, after delivery by the payee material, rendering it void.* If, after delivery of a joint and several note, the name of a third person be added as a maker with the privity of the holder, and without the knowledge of the original signers, it is void as to the latter.⁴

Sec. 343. Answer denying execution of note — That it was altered after execution by payee.—

And now comes the said defendant S. B. M. and for his first defense alleges that he did not make and deliver the promissory note in the petition described, and denies each and every allegation in said petition contained.

Defendant for his second and further defense alleges that he made, signed and delivered a certain promissory note similar in all respects to the said note set up by plaintiff in his said petition, excepting and wanting the words "to be paid annually" after the words and figures, "with — per cent. interest," whereby defendant's said note was so altered as to make the interest therein mentioned payable annually, contrary to defendant's original and only note, or any agreement, contract or knowledge on his part; that by the alteration of defendant's said note as aforesaid, the same was changed by plaintiff, or by some person at his request, into and the same became the identical note set up by plaintiff in his said petition, which note last aforesaid, by reason of the alteration therein contained, is not a note made or executed by this defendant; that said alteration was not made in framing said original promissory note or to further the intention of the parties thereto or any of them, but the said note of defendant was altered as aforesaid in fraud of this defendant's rights.

Wherefore defendant asks that plaintiff's action against him

¹ Fullerton v. Sturges, 4 O. S. 524.

² Wallace v. Jewell, 21 O. S. 163;

³ Jones v. Bangs, 40 O. S. 189. See McGrath v. Clark, 56 N. Y. 84; Etna Nat. Bank v. Winchester, 43 Conn. 391; Draper v. Wood, 112 Mass. 315; Waterman v. Vose, 43 Me. 504; Bradley v. Mann, 37 Mich. 1; Trigg v. Taylor, 27 Mo. 245.

Gardner v. Walsh, 5 El. & Bl. 84; Henry v. Coates, 17 Ind. 161; Bowers v. Briggs, 20 Ind. 189; Hall v. Henry, 19 Ia. 521; Chadwick v. Eastman, 58 Me. 12; Chapple v. Spencer, 28 Barb. 584; McCaughey v. Smith, 27 N. Y. 89; Shipp v. Suggett, 9 B. Mon. 8.

* Newman v. King, 54 O. S. 273.

be dismissed, and that said note set up by defendant be declared null and void, and that this defendant may go hence without day and recover of plaintiff his costs.

NOTE.—This defense was made in *Mills v. Vollrath*, 27 W. L. R. 36, the court charging that if the note was made by a party not interested in the note, and without the knowledge or consent of the payee, it would not affect the note; but if made as charged in the answer of the defendant it would be a material alteration, changing the effect and operation of the note; and upon such note as changed the plaintiff could not recover, unless the alteration had been ratified by the defendant. The judgments of both lower courts being affirmed, this feature of the charge evidently was approved by the supreme court. The defense will be good in cases where the evidence will prove the allegations, though it did not in the above case. An answer claiming an alteration must state that the same was made with the knowledge or authority of plaintiff. *Humphreys v. Crane*, 5 Cal. 178. A defendant may make as many defenses as he has. *Bank v. Closson*, 29 O. S. 78. Under a denial by a defendant that he made the note sued upon, evidence may be admitted showing that the note had been altered after its execution. *Boomer v. Koon*, 6 Hun, 645; *Andrews v. Bond*, 16 Barb. 688. See *Eckert v. Pickel*, 59 Barb. 545. As to alteration in amount, see *Pearson v. Hardin*, 54 N. W. Rep. 904.

Sec. 344. Answer that note was altered by the addition of a name.—

That he made, executed and delivered to the said W. B. S. a promissory note in all respects similar to the alleged promissory note, a copy of which is attached to the plaintiff's petition, except that the same did not then have subscribed thereto the name of D. D. S. as maker or otherwise. But he avers that after he had so made, executed and delivered the said note and the same had become a perfect and completed contract, the holder thereof, without the knowledge, authority or consent of this defendant, fraudulently caused and procured the name of D. D. S. to be subscribed thereto as additional maker, and thereby altered and changed the legal operation of the note and contract so by him made, executed and delivered as aforesaid.

Wherefore the defendant denies that he made, executed or delivered the alleged promissory note in the plaintiff's petition described, or that the same is his contract.

NOTE.—The signing of an additional name of a third person as maker, with privity of the holder, and without the consent of the original signer, is a material alteration of the note, which discharges such original signer. From charge of court in *Smucker v. Wright, Price, J., Logan Co., Ohio, C. P.*, from which answer was taken. Evidence as to alteration may be admitted under an answer denying the execution of the note. *Boomer v. Koon*, 6 Hun, 645.

Sec. 345. Reply that note was purchased in usual course of business, etc.—

The plaintiff denies each and every allegation contained in the second defense as stated in the defendant's answer.

The plaintiff further says that it took the note specified in the petition from the defendant in the regular and ordinary

course of its regular and ordinary business as such bank; that it took said promissory note as aforesaid before the same was due for full value in money paid therefor, to wit, the full face value of said note, less the ordinary bank discount charged for commercial paper at said time; and it took said promissory note as aforesaid without any notice or knowledge whatever of any of the matters stated in the answer, or of any defenses or equities existing against the same.

CHAPTER 23.

BONDS.

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| <p>Sec. 346. Parties to actions on bonds.</p> <p>347. Rules of pleading applicable to all bonds.</p> <p>348. Same continued — Consideration.</p> <p>349. Same continued — Execution of bond.</p> <p>350. Same continued — Demand.</p> <p>351. Same continued — Approval of bond.</p> <p>352. Same continued — Averment of damages.</p> <p>353. Same continued — Joint or several liability.</p> <p>354. Actions on administrator's or executor's bonds.</p> <p>355. Petition against administrator for maladministration.</p> <p>356. Petition by heir on administrator's bond.</p> <p>357. Petition by creditor on administrator's bond.</p> <p>358. Petition by succeeding administrator on bond of former administrator.</p> <p>359. Actions on appeal bonds.</p> <p>360. Petition on appeal bond.</p> <p>361. Petition on appeal bond where one of sureties is deceased.</p> <p>362. Petition on appeal bond from justice.</p> <p>363. Actions on attachment bonds.</p> <p>364. Petition on attachment bond — For the writ.</p> <p>365. Petition on redelivery bond — Attachment.</p> | <p>Sec. 366. Petition on building-contract bond.</p> <p>ACTIONS ON COUNTY OFFICIAL BONDS, ETC.</p> <p>Sec. 367. Petition by the state through the prosecuting attorney against county officer and his bondsmen to recover money illegally received.</p> <p>368. Petition on bond of clerk of court.</p> <p>369. Petition on bond of county recorder for negligence in performance of duty.</p> <p>370. Action on sheriff's bond.</p> <p>371. Petition on sheriff's bond.</p> <p>372. Petition on city marshal's bond.</p> <p>373. Petition on constable's bond — For failure to account for money, or for failure to levy, or for accepting insufficient delivery bond.</p> <p>374. Petition on bond of justice of the peace.</p> <p>375. Actions on guardian's bond — Pleading.</p> <p>376. Petition on guardian's bond.</p> <p>377. Petition on guardian's bond by succeeding guardian.</p> <p>378. Actions on indemnity bonds.</p> <p>379. Petition on indemnity bond.</p> <p>380. Actions on injunction bonds.</p> <p>381. Petition on injunction bond.</p> |
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Sec. 882. Petition on replevin bond.

883. Petition on title bond.

884. Answers and defenses to actions on bonds.

Sec. 885. Answer of surety on admin-

istration bond claiming

an equitable set-off against

claim of distributee.

886. Answer to action on appeal bond.

Sec. 346. Parties to actions on bonds.—The provision that actions may be brought in the name of the real party in interest is applicable to actions on bonds.¹ Any person, therefore, who is injured by a breach in a bond, or who is by law entitled to the benefit of the security, may bring an action in his own name against those liable.² It is held that the state is the proper party plaintiff in an action upon an official bond, such as a treasurer's bond.³ But this must necessarily be confined to cases where the state only is interested, and not where private interests have intervened, though it has been held in North Carolina that suits upon official bonds payable to the state must be brought in the name of the state; that the statute requiring the real party in interest to prosecute does not apply in such cases.⁴ Upon this point Mr. Bates states that the Ohio reports are full of cases by individuals on official bonds of public officers, but without comment on the point.⁵

The correct construction to be placed upon section 4994 of the code is believed to be that, in all cases where an individual has suffered an injury by the failure of an official to perform official duty, he may maintain an action on the bond of such official. The provision was intended to obviate the necessity of bringing suit in the name of the state for the use of the person injured.⁶ It has been held that official bonds cannot be made available to protect private interests without statutory provision;⁷ but, as before stated, section 4993 was enacted for this purpose.

Administration bonds are made payable to the state, but

¹ *Ante*, sec. 8; O. Code, sec. 4993.² O. Code, sec. 4994.³ *Kelly v. State*, 25 O. S. 567; *State v. Kelley*, 82 O. S. 421. See form, sec. 367, *post*; *Hunter v. Commissioner*, 10 O. S. 515.⁴ *Carmichael v. Moore*, 89 N. C. 29.⁵ *Bates' Pldg.*, p. 7.⁶ *Aucker v. Adams*, 23 O. S. 543, by private person on bond of justice.⁷ *State v. Nichols*, 8 Heisk. 657; *Crews v. Taylor*, 56 Tex. 461; *Fox v. Thibault*, 33 La. Ann. 32.

legatees or those interested may bring suit thereon.¹ And persons having an interest in the damages sought to be recovered in an action on an attachment bond are proper parties plaintiff.² County commissioners may bring an action on a clerk's official bond for the recovery of unclaimed costs.³ In an action against the surviving obligors of an official bond the personal representatives are not necessary parties.⁴

Sec. 347. Rules of pleading applicable to all bonds.—The code provides that an action may be prosecuted on a certified copy of a bond, making it the duty of the custodian to deliver a copy to any person claiming to be injured by a breach therein.⁵ The purpose of this provision undoubtedly is to enable a "real party in interest" to procure the necessary facts to bring suit. The manner of pleading a bond is well defined. It is an instrument for the conditional payment of money, and is generally conceded to fall within section 5085 of the code as an evidence of indebtedness.⁶ The precise question has probably not been decided, but it has been assumed in a number of cases that a bond falls within the meaning of an "evidence of indebtedness."⁷ If it be conceded, therefore, that it is an evidence of indebtedness, a copy must be attached or an excuse given for not so doing.⁸ The rules of pleading heretofore laid down⁹ must, however, be observed. It should be remembered that the copy attached cannot supply necessary averments in the petition, or serve the purpose of a statement of facts.¹⁰ It is essential that all the material facts be stated as in other actions,¹¹ which must necessarily be confined to the instrument itself. Great particularity is required in assigning breaches of a bond. The condition and breaches must be set forth with such certainty

¹ *Mighton v. Dawson*, 38 O. S. 650.

² *Alexander v. Jacoby*, 28 O. S. 358.

³ *State v. Orr*, 16 O. S. 522; *Commissioners v. Noyes*, 35 O. S. 201-6.

⁴ *Hunt v. Gaylor*, 25 O. S. 620.

⁵ O. Code, sec. 4994.

⁶ *Ante*, sec. 57.

⁷ In *Bentley v. Dorcas*, 11 O. S. 398, a copy of an appeal bond was attached, not as part of the petition, but as evidence of indebtedness, un-

der section 117 (5085) of the code. See, also, *Gutridge v. Vanatta*, 27 O. S. 366.

⁸ *Ante*, sec. 57.

⁹ *Ante*, sec. 57.

¹⁰ *Bentley v. Dorcas*, 11 O. S. 398; *Sargent v. Moore*, 1 Disn. 99; *West v. Dodsworth*, 1 Disn. 161; *Sprague v. Wells*, 47 Minn. 504.

¹¹ *Vilhac v. Railroad Co.*, 53 Cal. 209.

as to show the subject-matter, the character and the extent of the obligation.¹

Judge Swan states that upon a bond, contract, and in like cases where the instrument relates solely to the facts constituting the cause of action, it is not only proper, but the best mode, to allege the making of the instrument, and then set it out in full and allege the breach.² The courts have not entirely agreed with this view. It has been declared, in substance, not to be good pleading to make written instruments other than those for the unconditional payment of money part of the pleading; but if it seems necessary, in assigning the breaches of a bond, to substantially set out the whole of it, the same may properly be copied into the pleading, and the breaches assigned.³ If, therefore, in any case a bond is copied into the pleading, it is a substantial compliance with section 5085 of the code, thereby dispensing with the necessity of attaching a copy.⁴ But we do not think the court intended to favor the idea of copying the entire instrument into the pleading in any case, as it has been otherwise decided that as against a demurrer, it is a sufficient allegation of a breach to set forth the conditions alleged to have been broken, and aver their non-performance.⁵

Where there are several breaches assigned, each one, taken in connection with the introductory averments, is regarded as a separate paragraph stating a distinct cause of action;⁶ and

¹ *Supervisor v. Semler*, 41 Wis. 374; *State v. Coffey*, 6 O. S. 150; *Sargent v. Moore*, 1 Disn. 99.

² *Swan's Pldg.* 199.

³ *Crawford v. Satterfield*, 27 O. S. 425. See, also, sec. 57, p. 61, note.

⁴ *Ante*, sec. 57. It was held in *Gibson v. Robinson*, 16 S. E. Rep. 969 (Ga.), that where the contents of a bond are substantially set forth it is not necessary to attach a copy.

⁵ *Gutridge v. Vanatta*, 27 O. S. 366; *Governor v. White*, 24 Am. Dec. 763; *Hughes v. Miller*, 5 Johns. 168; *Smith v. Jansen*, 8 Johns. 111; *Postmaster v. Cochran*, 2 Johns. 413. It is said that there are two modes of

declaring upon a bond — one by a single bill without noticing the condition, and the other to set out the conditions and assign the breaches. In the first instance the defendant must crave oyer of the condition and plead performance, and the plaintiff reply by assigning the breaches. *Reynolds v. Hurst*, 18 W. Va. 648, citing 6 Rand. 227; 4 Muntf. 494; 4 Rand. 413; 5 Muntf. 246.

⁶ *State v. Roche*, 94 Ind. 376; *Reno v. Tyson*, 24 Ind. 56; *Colburn v. State*, 47 Ind. 310; *Boden v. Dill*, 58 Ind. 273; *Mustard v. Hoppees*, 69 Ind. 324. And a demurrer may be addressed to each breach. *McFall v. Sew-*

upon a general demurrer to the whole, if any one breach is well assigned, the demurrer should be overruled.¹ Recovery can be had for only such breaches as may be assigned in the petition.² An averment that the defendants and each of them have wholly neglected and refused to pay is sufficient to show a breach;³ and so with an allegation that a penalty is due and unpaid;⁴ or an averment that an administrator or an executor who has resigned has failed to pay his successor the amount found due from him on settlement fully shows a breach of the condition of his bond "to administer according to law;"⁵ or that an officer has received money belonging to another which he retains and refuses to deliver to the proper officer.⁶ In an action against the sureties of a negotiable bond for failure to collect and pay over money on execution, it should be averred that the liability occurred during the time defendants were bound.⁷ And in a suit upon a tax collector's bond for failure to pay over state and county taxes, the petition should designate the several sums which belong to the state or county treasury.⁸ Where conditions of a bond require compliance with the terms of another obligation, which are not fully stated in the condition, the petition should set out the obligation with a corresponding breach.⁹

A statutory undertaking should be considered in the light of the statute with reference to the state of the pleadings in the action in which it was given,¹⁰ but it is not necessary to set out the law under which a bond is given,¹¹ although a petition which merely states that a bond is given according to law, without setting out the conditions, is bad;¹² the existence of the office, and the appointment or election of the officer, should be fully set forth.¹³ And in a suit upon an official bond con

ing Machine Co., 90 Ind. 148; Colburn v. State, 47 Ind. 320; Richards v. State, 55 Ind. 381.

¹ People v. Gregory, 11 Bradw. 370.

² Colgate v. Roberts, 85 Ind. 464.

³ Gardner v. Donnelly, 86 Cal. 367.

⁴ Stanley v. Montgomery, 102 Ind. 102.

⁵ Slagle v. Entrekin, 44 O. S. 637.

⁶ Mendocino Co. v. Morris, 32 Cal. 145.

⁷ Commonwealth v. Hughes, 10 B. Mon. 160; s. c., 10 B. Mon. 461.

⁸ Whitfield v. Wooldridge, 23 Miss. 183.

⁹ Portage Canal Mfg. Co. v. Crittenden, 17 O. 486.

¹⁰ Secrest v. Barbee, 17 O. S. 425.

¹¹ Mason v. Montgomery, W. 722.

¹² Bisack v. Pape, 1 W. L. B. 126.

¹³ Common Pleas Court v. Sergeant W. 482.

ditioned to pay over all money which may come into the hands of an officer, an averment that he received certain money belonging to the plaintiff which he failed to pay over sufficiently shows that such money was received by virtue of his office;¹ but an allegation that a marshal under a writ of replevin seized and took property, claiming under and by virtue of a writ of replevin, is not sufficient: it should be averred that the officer is acting under a valid process and not claiming to so act.² In an action on a negotiable bond for illegality and insufficiency of a return made by an officer, the petition should show the return which is alleged to be illegal and insufficient.³ In an action on the bond of a sheriff it should be alleged that it was the official bond of the sheriff, and enough of it should be set forth to show that those who signed it were bound to indemnify all parties injured by the sheriff's misfeasance.⁴ Where the petition is for failure to levy an execution on chattels, it should be averred that they were within the officer's bailiwick.⁵ In a suit on a forfeited recognizance, the petition stating that the bond was forfeited, and the facts, is sufficient without averring that the bond was "duly" forfeited.*

Sec. 348. Same continued — Consideration.— It being a rule that sealed instruments import consideration, it need not be averred in the petition; and bonds, although private seals have been abolished in Ohio, fall under this class.⁶ "Bond or writing obligatory" implies an instrument under seal and therefore a consideration.⁷

Sec. 349. Same continued — Execution of bond.— In framing a petition it need not be averred that the parties signed the bond or that it was given in pursuance of statute.⁸ A petition averring the execution of a bond by both principal and surety, containing a copy thereof which does not give the signature of the principal, will in the absence of objection be good.⁹ And an allegation that the defendants, "by their certain writing obligatory, sealed by their seals, became bound unto

¹ *Building Ass'n v. Cummings*, 45 O. S. 664. *Bildersee v. Aden*, 12 Abb. Pr. (N. S.) 324; *Doolittle v. Dininny*, 31 N. Y. 350.

² *Gerber v. Ackley*, 37 Wis. 43.

³ *Graham v. State*, 6 Blackf. 32.

⁴ *Ghiraldelli v. Bourland*, 32 Cal. 585.

⁵ *State v. White*, 88 Ind. 537.

⁶ *Johnson v. Ackerson*, 40 How. Pr. 222; *Harrison v. Utley*, 6 Hun, 505;

⁷ *Paddock v. Hume*, 6 Oreg. 82.

⁸ *Shaw v. Tobias*, 3 N. Y. 188; *McMillan v. Dana*, 18 Cal. 339.

⁹ *Mendocino Co. v. Morris*, 33 Cal. 145.

* *Kinney v. State*, 14 O. C. C. 91; 7 Oh. Dec. 97.

—— in the sum of \$——, for the just payment of which they bound themselves," is a sufficient averment of execution.¹ A petition alleging that a defendant executed a bond, which contains a copy thereof, is a sufficient averment of delivery;² and so with an allegation that an undertaking was executed by a defendant when there is no denial thereof in the answer.³

Sec. 350. Same continued — Demand.— It is the better practice in actions on the bond of a particular officer to follow the statute in reference thereto and allege in the petition all steps necessary to be taken to make the bond binding.⁴ Whether or not it is necessary to allege that demand has been made depends largely upon the bond or upon the duty and liability of the officer in the particular case. If the bond provides that payment is to be made on demand, it must be so averred in order to state the cause of action;⁵ as where an appeal bond provides that a demand for all costs and damages should be made,⁶ or where an action lies on a bond of an officer for withholding money, a demand or excuse for want of it is necessary, as it cannot be withheld until refusal.⁷ Under the statute as to executions against property, a sheriff must pay money collected by him to the judgment creditor upon demand made therefor,⁸ and it is not necessary that the demand be made on him during the term of office at which the money was received.⁹ The question becomes particularly important when considered with reference to the limitation of actions, it being necessary in some cases that demand be made before an action accrues, and hence the statute will run from the time when such demand is made.¹⁰

¹ *State v. Rush*, 77 Mo. 586.

Bank v. Livingston, 2 John. Cases, 409.

² *Insurance Co. v. Rogers*, 80 Barb. 491.

⁶ *Douglass v. Rathbone*, *supra*.

³ *Robert v. Good*, 36 N. Y. 408. Averment of execution imports delivery. 2 Sandf. Ch. 400. Signing need not be averred — sealing and delivery only, as that determines its validity. *Mason v. Montgomery*, W. 722.

⁷ *State v. Cowles*, 5 O. S. 87.

⁸ R. S., sec. 5896.

⁹ *King v. Nichols*, 16 O. S. 80; *Brobst v. Skillen*, 16 O. S. 382; *Sidner v. Alexander*, 81 O. S. 378.

⁴ As in *State v. Newell*, 2 O. C. C. 204.

¹⁰ *Gill v. Cooper*, 111 N. C. 311; 16 S. E. Rep. 316 (1892); *Keithler v. Foster*, 22 O. S. 27; *El Dorado Tp. v. Gordon*, 50 Kan. 307; 32 Pac. Rep. 32 (1893).

⁵ *Douglass v. Rathbone*, 5 Hill, 143;

Sec. 351. Same continued — Approval of bond.— It is held that, so far as the liability of sureties on a bond is concerned, it is immaterial whether the same be approved or not. It would therefore follow that it is unnecessary to make an allegation as to approval.¹ Yet the statement heretofore made as to the execution and delivery of a bond would be equally applicable to the approval thereof, and it would seem to be better practice to aver that the same has been approved.² But no averment of approval of an injunction bond by the clerk is necessary where the statute requires no such indorsement, although an allegation that it was executed in pursuance of an order of court, and filed with the clerk and an injunction issued, shows a sufficient approval.³ Under an averment that a bond of a justice was approved by two trustees, if nothing appears to the contrary it will be presumed to have been approved at a meeting of the trustees.⁴

Sec. 352. Same continued — Averment of damages.— Care should be exercised in framing allegations as to damages sustained; as, for example, in an action on a bond conditioned that a house should be erected according to specifications, and, in case of failure to complete the same, recovery should be had upon the bond, the plaintiff cannot recover more than nominal damages unless he avers that he has sustained actual injury.⁵ But where a bond provides that in case of a breach "the penalty therein written shall be taken and deemed as liquidated damages," it is not necessary to aver or prove actual damages.⁶ The damages which may be recovered by reason of attorneys' fees in suits upon an injunction bond are those which are necessarily incurred in obtaining a dissolution of the same.⁷ A bond is good though the conditions

¹ *McCracken v. Todd*, 1 Kan. 48; *People v. Evans*, 29 Cal. 439; *Mendocino Co. v. Morris*, 32 Cal. 145. It is for the benefit of the public, and its omission is no defense to the sureties. *Bates' Pldg.* 359, citing 3 Mass. 86; 22 O. 317.

² See *State v. Newell*, 2 O. C. C. 204; *ante*, sec. 349.

³ *Williamson v. Hall*, 1 O. S. 196.

⁴ *Place v. Taylor*, 22 O. S. 317.

⁵ *Sprague v. Wells*, 47 Minn. 504.

In this case he should have alleged that he had completed the house and incurred expense.

⁶ *Stanley v. Montgomery*, 102 Ind. 102.

⁷ *Noble v. Arnold*, 28 O. S. 264; *Riddle v. Cheadle*, 25 O. S. 278. Upon questions of damages, see *Hill-mer v. Richards*, 18 O. 185; *Lawton v. Green*, 64 N. Y. 326; *Raupman v. Evansville*, 44 Ind. 392; *Reece v. Peltzer*, 1 Ill. App. 215.

are substantially set forth as required by statute; and it is a well-settled rule of construction that a surety is liable only upon the strict letter of his bond.¹ In a suit on a sheriff's bond for failure to levy and return execution, nominal damages only can be recovered unless the facts averred sufficiently show actual damage.²

Sec. 353. Same continued — Joint or several liability.—

In determining whether a right of action on an undertaking be joint or several, the terms of the bond and the provisions of the statute under which it is given must be considered. The terms of the statute are regarded as part of the bond, as if embodied therein;³ and if the statute authorizes a joint suit against all the obligors on a bond, a court can render a several judgment against one or more of the defendants, leaving the execution to proceed against the others.⁴ All obligees in a joint bond must join in an action thereon, or allege an excuse for not so doing, or the non-payment of the debt.⁵ Where a joint bond is given by two administrators and the property belonging to the estate goes into their joint possession, and waste is committed by one after the death of the other, the estates of both must be exhausted before suit can be brought against the sureties on their bond.⁶

Sec. 354. Actions on administrator's or executor's bonds.

It is provided by statute that a creditor when entitled to payment of his debt, and the amount has been allowed or ascertained by judgment or by an order of distribution, may, after having made a demand upon such administrator or executor, institute suit upon the bond given.⁷ An administrator *de bonis non* may, however, maintain an action upon a bond of a deceased administrator without having the amount due the estate ascertained by the finding or judgment of a

¹ Smith v. Hensman, 80 O. S. 662;
Lang v. Pike, 27 O. S. 498; Hall v.
Williamson, 9 O. S. 23; Marce v.
Byrnes, 7 W. L. B. 345.

² State v. Dixon, 80 Ind. 150.

³ Alexander v. Jacoby, 28 O. S.
858, 384.

⁴ Aucker v. Adams, 23 O. S. 543.

⁵ Strange v. Floyd, 9 Gratt. 474.

⁶ Eckert v. Myers, 45 O. S. 525.
See Burgoyne v. Life Ins. Co., 5 O. S.
586; Jamison v. Lillard, 12 Lea, 690;
Babcock v. Hubbard, 2 Conn. 586;
Dobyns v. McGoverns, 15 Mo. 662;
Boyd v. Boyd, 1 Watts, 365; Stephens
v. Taylor, 62 Ala. 269.

⁷ R. S., sec. 6210.

court.¹ An allegation in a petition by a creditor that a claim has been allowed, without an averment that demand has been made, is not sufficient, but demand must be averred.² Suit may also be brought by a legatee, widow or other distributee, after the amount due them respectively has been ascertained or determined by the court, if the executor or administrator fails, upon demand, to pay the same.³ A creditor may, notwithstanding the fact that further time has been allowed by an administrator for the settlement of the estate, maintain an action upon the bond after eighteen months from the date thereof;⁴ but a legatee or distributee cannot maintain an action for the recovery of his legacy or distributive share until after the expiration of the four years allowed creditors for the presentment of claims, unless allowed so to do by the probate court.⁵ But where the probate court has ordered an executor to pay a legatee the amount due him, no further or other order is necessary to enable such legatee to bring suit.⁶ An action on a bond of an administrator or executor should be brought in the court of common pleas or superior court of the county in which it was given.⁷ The probate court may also authorize any creditor, next of kin, legatee or other person aggrieved to bring suit for any maladministration.⁸ The suit under this section may be brought in the name of the state, the payee of the bond or by a legatee.⁹ Where an executor or administrator has died, has been removed or has resigned, an action may be maintained on his bond by any succeeding administrator for any breach therein,¹⁰ as, for example, the recovery of property belonging to the estate for which he has failed to account;¹¹ but such succeeding administrator cannot bring suit against the personal representatives of the former administrator, being confined to an action on the bond;¹² nor is it

¹ Douglass v. Day, 28 O. S. 175.

² Woodson v. State, 17 O. 161. See State v. Cowles, 5 O. S. 87; Case v. State, 10 W. L. J. 168.

³ R. S., sec. 6211; Douglass v. Day, 28 O. S. 175; Dawson v. Dawson, 25 O. S. 448; State v. Cutting, 2 O. S. 1. For failure to pay legacy, Gould v. Steyer, 75 Ind. 50; Heady v. State, 60 Ind. 316.

⁴ Greer v. State, 2 O. S. 575.

⁵ Dawson v. Dawson, *supra*.

⁶ Gandolfo v. Walker, 15 O. S. 251.

⁷ R. S., sec. 6215; Dawson v. Dawson, 25 O. S. 448.

⁸ R. S., sec. 6212.

⁹ Mighton v. Dawson, 88 O. S. 650-5.

¹⁰ R. S., sec. 6214.

¹¹ Tracey v. Card, 2 O. S. 482.

¹² Curtis v. Lynch, 19 O. S. 392.

necessary that an administrator *de bonis non* be special, authorized to bring such suit;¹ nor that the amount due the estate from the deceased administrator be first ascertained by the finding or judgment of a court.²

An averment of failure of an administrator or executor to pay to his successor an amount found due from him upon settlement is a sufficient assignment of a breach of the condition of his bond "to administer according to law" the assets of the estate, and recovery may be had on the bond of the former administrator against his sureties.³ In actions by an administrator *de bonis non* it will be sufficient to aver his appointment without stating that he has given bond.⁴ Where the breaches alleged in the bond are failure to return an inventory and wasting and converting assets, the action should be for the benefit of the estate and not of a particular legatee or distributee;⁵ and it will be a sufficient averment of a breach to set forth the conditions of the bond and aver their non-performance.⁶ A petition on an administrator's bond claiming that he has failed to account for a certain sum of money as interest by him collected, and wrongfully withheld distribution thereof, though demanded, and that he has wrongfully delayed settlement of the estate, is good as to each breach.⁷ Where an action is brought for maladministration other than the non-payment of an amount due a creditor from an estate,⁸ or for the share due a legatee, widow or other distributee,⁹ it should be brought for the benefit of all parties interested in the estate, and not for the benefit of a particular legatee or distributee.¹⁰

Sec. 355. Petition against administrator for maladministration.—

Plaintiff brings this action on behalf of himself and all others interested in the estate of A. B., deceased, and says that the

¹ Gutridge v. Vanatta, 27 O. S. 366. N. Y. 565; 116 Mass. 553; 59 Ill. 148;

² Douglass v. Day, 28 O. S. 175; 28 Kan. 235.

O'Connor v. State, 18 O. 225.

⁴ Gutridge v. Vanatta, *supra*.

³ Slagle v. Entekin, 14 O. S. 687;

⁵ Dawson v. Dawson, *supra*.

R. S., secs. 6020, 6214; Luce v. Treasurer, W. 655; Gutridge v. Vanatta,

⁶ Gutridge v. Vanatta, *supra*.

supra; O'Connor v. State, *supra*; Foster v. Wise, 46 O. S. 20-25. See 72

⁷ Stanton v. State, 82 Ind. 463.

⁸ R. S., sec. 6210.

⁹ R. S., sec. 6211.

¹⁰ Dawson v. Dawson, 25 O. S. 443.

defendant, C. D., was appointed administrator of the estate of the said A. B., deceased, by the probate court of — county, and that the said defendants thereupon duly executed and filed with said probate court an administration bond, the said A. B. as principal, and the said E. F. and G. H. as sureties thereon, a copy of which bond is hereto attached, whereby they became bound to the state of Ohio in the penal sum of — dollars, and thereupon the said A. B. entered upon the duties of administrator of such estate, and said administration bond contained the following conditions, to wit: [*Here insert the conditions complained of*].

The plaintiff further says that a large amount of property belonging to said estate came into the hands of said A. B. to be administered upon, among which was the following, to wit: [*Here describe and give full value of property*].

This plaintiff says that said A. B. has not made any inventory of the above-mentioned property, or returned the same to the said probate court, nor administered upon the same or any part thereof, but has taken and converted the same to his own use.

Plaintiff says that there are no debts against said estate, and that the period has long since elapsed since the defendant, A. B., should have paid the amount due this plaintiff and those on whose behalf he sues as their distributive share of their estate, and that demand has been duly made upon said A. B. for the same, but that he has refused to pay the same, and pretends that there are no more assets of said estate, which plaintiff says is untrue, by reason whereof said bond has become forfeited, and said plaintiff is entitled in law to have an action thereon against the makers thereof, and that by the order of the probate court made on the — day of —, 18—, plaintiff was authorized by said court to bring a suit upon said bond as provided by law.

Wherefore the plaintiff prays judgment against the defendants for the sum of — dollars.

NOTE— Authorized under R. S., sec. 6212.

Sec. 356. Petition by heir on administrator's bond.—

Plaintiff says on the — day of —, 18—, the defendant A. P. was by the probate court of said county of —, Ohio, duly appointed administrator of the estate of A. R. C., deceased, late of said county, intestate.

That said A. P. accepted said trust, and duly qualified as such administrator, and entered upon the discharge of the duties of said trust; that upon such appointment said A. P., with the defendant J. F. and one N. C. (who has since died) as his sureties, executed in the form prescribed by law a joint and several administration bond, and delivered the same to the judge of the probate court of said county (a copy of which

bond, duly certified, is hereto attached, marked "Exhibit A"), whereby they became jointly and severally bound unto the state of Ohio, in the sum of — dollars, subject, among other conditions prescribed by law, to the following conditions, to wit: * that if the said A. P. shall pay any balance remaining in his hands upon the settlement of the accounts to such persons as said court or the law shall direct, then said bond to be void, otherwise to be and remain in full force and virtue.

That on the — day of —, 18—, said administrator's accounts were settled in said probate court, and the sum of — dollars was found by the consideration of said court to be in his hands for distribution, which said sum said probate court ordered said administrator to distribute according to law.

That the said A. R. C. died, leaving nine children, who, as heirs at law, are entitled to said sum remaining in the hands of the said administrator for distribution; that plaintiff, as such child and heir at law, is entitled to one-ninth part of said sum, to wit, the sum of — dollars.

Plaintiff further saith that at various times since the approval of said account by said probate court he has demanded the payment of his distributive share of said estate from said administrator, to wit, the said sum of — dollars, but that said administrator has not paid said sum, or any part thereof; that by reason of the premises there is due plaintiff from said defendants the sum of — dollars, with interest from —, 18—; wherefore he prays judgment against said defendants for the said sum of — dollars, with interest from —.

NOTE.—From *Fisher v. Cassidy*, 49 O. S. 421. Suits may be brought by heir or legatee. R. S., sec. 6211. See *ante*, sec. 354. The death of one of two sureties before any liability is incurred does not release his estate. *Johnson v. Harvey*, 84 N. Y. 863, 864. Liability of surety does not depend on whether or not his name appears in body of bond. *Partridge v. Jones*, 38 O. S. 375; *McLain v. Simington*, 37 O. S. 484. Additional bond relates back to beginning of trust. *Thorne v. Maguire*, 8 Am. L. Rec. 140.

Sec. 357. Petition by creditor on administrator's bond.—

[*Caption.*]

[*Formal averments as in ante, sec. 356, with the substance of the special condition broken.*]

Plaintiff further says that he is a creditor of the estate of the said A. B. in the sum of — dollars with interest from —.

A duly authenticated written statement of his said claim was presented to the said defendant, C. D., administrator aforesaid, which was duly allowed by said administrator as a valid claim against said estate; that the period of eighteen months allowed the said defendant for the settlement of said estate and since the date of said administration bond has expired. That said administrator has assets belonging to

said estate in his hands applicable to the payment of plaintiff's claim, and that said estate is clearly solvent. That after assets belonging to said estate had come into the hands of said administrator, and since the expiration of said eighteen months, to wit, on the — day of —, 18—, plaintiff duly demanded payment of his said claim, which said defendant has neglected and refused to pay.

Wherefore plaintiff asks judgment against the said defendant in the sum of — dollars with interest from —.

NOTE.—R. S., sec. 6210; *ante*, sec. 354. As to recovery by creditor, see *State v. Brown*, 80 Ind. 425.

Sec. 358. Petition by succeeding administrator on bond of former administrator.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—,* the said defendant, A. B., was by the probate court of — county, Ohio, removed as administrator [*or*, executor] of the estate of C. D., deceased, and his letters of administration revoked.

[*Or*,* the said A. B. tendered his resignation as administrator of the estate of the said C. D., deceased, which was duly accepted by the probate court of — county, Ohio.]

That on the — day of —, 18—, plaintiff was by the said probate court of — county, Ohio, duly appointed administrator *de bonis non* of the estate of the said C. D., deceased, and is now the duly acting and qualified administrator of such estate.

That said defendant, A. B., as such administrator as aforesaid, and said defendants, E. F. and G. H., as sureties, duly executed an administration bond (a copy of which is hereto attached), whereby they became bound unto the state of Ohio in the sum of — dollars, upon the conditions following: [*State conditions.*]

That on the — day of —, 18—, said A. B. filed his final account with the probate court of — county, Ohio, which said account was duly approved, confirmed and allowed by said court, said account showing a balance in the hands of the said A. B. as such administrator due the estate of the said C. D., deceased, of the sum of \$—.

[*Or*, Said A. B. received and collected assets belonging to said estate, amounting to \$—, for which he has wholly failed, refused and neglected to file an account with the probate court as by law required, and has failed and neglected to administer the assets of said estate, according to law, but has wrongfully and wilfully appropriated and converted the same to his own use. Said defendant, A. B., has failed to account for and settle with this plaintiff as his successor.]

That on the — day of —, 18—, this plaintiff duly demanded payment of said sum from the said defendant, A. B.,

with which demand he failed and wholly refused and still refuses to comply. There is therefore due said plaintiff as such administrator, from the said defendants, said sum of \$—, for which he asks judgment.

NOTE.—Succeeding administrator may sue on bond of former administrator or executor for any breach thereof. R. S., sec. 6214.

Sec. 359. Actions on appeal bonds.—The penalty of an appeal bond is double the amount of a judgment for the payment of money only, and in all other cases the amount is to be fixed at such reasonable sum as will, in the opinion of the court, sufficiently cover the probable loss, damage or injury which the opposing party may sustain.¹ The bond is made payable to the adverse party or otherwise, as may be directed by the court, and subject to a condition that the party shall abide by the decision of the appellate court and pay all costs and damages if the same be against him.² It should be averred in an action on an appeal bond that there was a suit in which a judgment was appealed from.³ It is not sufficient to allege a judgment on an appeal between parties of the same name as those in the bond, but it must be shown that the action is the one from which the appeal is taken, as it will not be presumed that there were any other actions between the same parties in the same court.⁴ An action cannot be maintained on an appeal bond when it is ascertained by the return of an execution that a debtor has not sufficient property to pay the original judgment, and the petition should show that the same is not paid.⁵ But an action cannot be sustained on a bond for an appeal from a judgment rendered by a justice, where neither the appellant or appellee file a transcript within the required time.⁶ A surety cannot urge as a defense to an action on an appeal bond that he informed the officer that the principal debtor had property, but it must appear that there was property, and that the plaintiff and surety were so informed.⁷ If there is any question as to whether or not the amount expressed in an appeal bond be double the amount of the judgment, the pleading should disclose the amount of the judgment

¹ R. S., sec. 5280.

² R. S., sec. 5231.

³ Marks v. Harris, 10 Am. Law Rec. 481.

⁴ North v. Merchant, 1 W. L. M. 284.

⁵ Mayo v. Williams, 17 O. 244.

⁶ Gimperling v. Hanes, 40 O. S. 114.

⁷ Stanley v. Lucas, W. 84.

and also of the bond.¹ The date of the judgment appealed from should be alleged, the term of the court not being sufficiently definite to be relied upon.² In a suit to recover against the surety on an appeal bond the amount of the judgment rendered in the appellate court, it is competent by averment in the petition to identify the appellant whose name was omitted from such bond.³

Sec. 360. Petition on appeal bond.—

On the — day of —, 18—, the plaintiff, by the consideration of the court of common pleas of — county, Ohio, in a case therein pending, wherein A. B. was plaintiff and C. D., defendant herein, was defendant, said cause being numbered —, recovered a decree against the said C. D., defendant, for [*state nature of decree*] and costs, from which said judgment and decree said defendant, C. D., took an appeal to the circuit court of — county, Ohio. That on the — day of —, 18—, he perfected his said appeal by filing with the clerk of said court of common pleas his appeal bond in the sum of \$—, with the defendants E. F. and G. H. as sureties thereon, which said bond was duly approved, a copy of which is hereto attached, marked "Exhibit A." The conditions of said bond were such that [*state conditions either in substance or by copy*].* That such proceedings were had in said circuit court in said cause that on the — day of —, 18—, the plaintiff recovered a judgment and decree against the said — — for [*state what*], and for costs, taxed at \$—. That said judgment and decree remains unreversed and unsatisfied, and said C. D. has not complied with the same by [*state what was required of him*], and the conditions of said bond are thereby broken.

[*Prayer.*]

NOTE.— Appeal to circuit court. R. S., sec. 5237. When appeal may be taken. R. S., sec. 5226; Whittaker's Code, pp. 184-6. Parties in trust capacity need not give bond. R. S., sec. 5228. See R. S., secs. 5229-30. A bank check cannot be given in lieu of appeal bond. *Allen v. Turnpike Co.*, 19 W. L. B. 168. Surety need not be resident of county. *Bushong v. Graham*, 4 O. C. C. 140. Assignee need not give an appeal bond (*Kennedy v. Thompson*, 3 O. C. C. 446), but must as to his personal claim. *Biddle v. Phipps*, 2 O. C. C. 61.

Sec. 361. Petition on appeal bond where one of sureties is deceased.—

[*Caption.*]

[*Formal part as in ante, sec. 360, to *.*]

And the said plaintiffs say that afterward such proceedings were had on said appeal in said — court that at its — term, 18—, the said B. H. recovered a judgment against the said M. M. for the sum of \$— and costs taxed in said action; and the said plaintiff further states that afterward, to wit, on the — day of —, 18—, he caused an execution to be issued on said judgment, directed to the sheriff of said county, for the collection of said sum of money, and that on the — day

¹ *Bank v. Bartlett*, W. 741.

² *Reddish v. Harrison*, W. 231.

³ *Wile v. Koch*, 54 O. S. 608.

of —, 18—, said sheriff returned said execution indorsed "No goods or chattels, lands or tenements of said M. M. found in my county whereon to levy to satisfy this execution or any part thereof."

The plaintiffs say that the said S. W. M. is dead, and that M. E. M. is his duly appointed, qualified and acting executrix. Plaintiffs say that they presented the claim set out in this petition to the said M. E. M. as a claim against the estate of S. W. M., and that she, on the — day of —, 18—, rejected the same. Plaintiffs say that neither of said defendants has paid said sum of money so awarded against the said M. M., or any part thereof, and the same is now due and unpaid, whereby an action has accrued to the plaintiff to have and demand the said sum of \$— with interest thereon from the — day of —, 18—, from the said defendants.

The plaintiffs therefore, by reason of the premises hereinbefore set forth, pray judgment against the said defendants for said sum of \$—, with interest thereon from the — day of —, 18—.

NOTE.— From *Moore v. Helbush*, Supreme Court, unreported, No. 1538.

Sec. 362. Petition on appeal bond from justice.—

[Caption.]

That on the — day of —, 18—, the plaintiff recovered a judgment before J. P., a justice of the peace in and for the township of —, of the county of —, and state of Ohio, against the defendant C. D. for \$— and costs, from which judgment the said C. D. duly appealed to the — common pleas court of said state, and executed his appeal bond in the sum of \$— with the defendants E. F. and G. H. as sureties, a copy of which bond is hereto attached, marked "Exhibit A," which bond was duly approved by said justice by indorsement thereon, and was conditioned that said C. D. would prosecute his appeal without unnecessary delay, and, if judgment were rendered against him on appeal, would satisfy the same together with the costs.

That such proceedings were had in said common pleas court in said cause, that on the — day of —, 18—, the plaintiff recovered a judgment against said C. D. for \$— and costs.

That said judgment, interest and costs thereon has not been paid and the same remains unsatisfied.

[Prayer.]

NOTE.— R. S., sec. 6584. Failure to prosecute appeal successfully is a breach of bond. *Murphy v. Steele*, 51 Ind. 81.

Sec. 363. Actions on attachment bonds.—

Where an attachment has been maliciously or even wrongfully sued out an action may be maintained upon the undertaking for the

recovery of such damages as may be sustained by reason thereof, and it is not necessary that the same be liquidated in another action against the principal.¹ Such an action may be prosecuted by those obligees who have an interest in the damages, without making others having no interest therein, by reason of having been discharged, parties thereto; and it is not necessary to aver that the attachment has been discharged as to those obligors who are not necessary parties.² Nor need it be alleged that an affidavit was filed, or that a writ was delivered to the proper officer, or that the goods were sold by any person having authority;³ nor the grounds on which the writ was issued;⁴ nor a return of the same;⁵ nor want of probable cause or malice.⁶ Under a statute requiring an attachment bond to be signed by the plaintiff, the same is annulled if signed only by a stranger, and an action cannot be maintained thereon; nor can it be contended in such an action that the bond is valid at common law unless an allegation be made in the petition to that effect.⁷

The relation existing between sureties on an attachment bond and those on an error bond in the same action is that of principal and surety respectively; and hence the sureties on the attachment bond, being the principals who have paid the damages, cannot compel contribution by the sureties on the error bond.⁸ The payees and subsequent attaching creditors may join as plaintiffs in an action on an attachment undertaking although the latter are not named as payees therein.⁹ The fact that a defendant has given a redelivery bond cannot be set up as a bar to an action on the attachment undertaking.¹⁰ If the petition be defective by reason of not alleging that the attachment was wrongfully issued, it may be cured by the de-

¹ *Bruce v. Coleman*, 1 Handy, 515; *Tallant v. Burlington Co.*, 86 Iowa, 263; *Seay v. Greenwood*, 21 Ala. 491. The action must be brought in the court in which it was given. *King v. Henry*, 2 Disn. 78.

² *Alexander v. Jacoby*, 23 O. S. 358. See *Boyd v. Martin*, 10 Ala. 700; *Gayle v. Martin*, 3 Ala. 593; *Hill v. Wood*, 4 Ala. 214.

³ *Trentinan v. Wiley*, 85 Ind. 33.

⁴ *Berry v. Hart*, 1 Colo. 246.

⁵ *Berry v. Hart*, *supra*.

⁶ *Bruce v. Coleman*, 1 Handy, 515.

⁷ *Booker v. Smith*, 16 S. E. Rep. 774 (N. C., 1893).

⁸ *Bradford v. Mooney*, 2 C. S. C. R. 468 (1872); *Hartwell v. Smith*, 15 O. S. 200.

⁹ *Rutledge v. Corbin*, 10 O. S. 478.

¹⁰ *Alexander v. Jacoby*, 23 O. S. 358.

fendant answering.¹ It has been held that a petition alleging that the principals made, executed and filed a bond, a copy of which is set forth showing the signatures attached, is not a sufficient allegation as to the execution by the sureties, where the answer merely admits the fact stated to be true.²

Sec. 364. Petition on attachment bond — For the writ. —

[*Caption.*]

Plaintiff says that the defendant A. B. commenced in the — court of — attachment proceedings against this plaintiff for the recovery of money, alleging as a ground for said proceedings, as disclosed in his affidavit, the following: [*Here state the ground of attachment.*]

That at the time of instituting said proceedings and in order to procure said writ of attachment, the said defendants duly executed and filed in the office of the clerk of said — county, Ohio, their certain bond, in the sum of \$—, with the defendants O. D. and E. F. as sureties, a copy of which is hereto attached, marked "Exhibit A," the conditions of which bond are in substance that [*here state the substance or copy of conditions*], which said bond was duly approved by said clerk; that thereupon a writ of attachment was issued out of said court which was levied upon the following goods and chattels of plaintiff which were taken into custody of the sheriff of said county, and by him retained for the space of — days, to wit: [*Here describe the goods.*]

Plaintiff further says that the said writ of attachment was wrongfully sued out, and that there was no just cause for issuing the same, and the statement in said affidavit was false; that this plaintiff was not about to convert his property and credits or any part thereof into money for the purpose of placing the same beyond the reach of his creditors; and that on the — day of —, 18—, upon a motion duly made in said court, said attachment was discharged and the proceedings dismissed at the cost of the said defendants.

Plaintiff has sustained damages by reason of the said wrongful suing out of said writ of attachment, to wit: [*Here state the special ground of damages.*]

Wherefore plaintiff asks judgment against the defendants in the sum of — dollars with interest.

NOTE. — When undertaking required. R. S., sec. 5523. See ch. 18, sec. 252. Abandonment of attachment proceedings, merely, will not give rise to an action on the bond. *Smith v. Story*, 4 Humph. 169; *Pettitt v. Mercer*, 8 B. Mon. 51. But see *Cox v. Robinson*, 2 Rob. (La.) 313. If the proceedings are wrongful and oppressive, even though there be a good cause for the main action, the defendant may have a cause of action on the bond. *Harper v. Keys*, 43 Ind. 220.

¹ *Drake v. Sworts*, 38 Pac. Rep. 563 (Oreg., 1898).

² *Seattle Crockery Co. v. Haley*, 33 Pac. Rep. 650 (Wash., 1893).

Sec. 365. Petition on redelivery bond — Attachment.—

[*Caption.*]

That on the — day of —, 18—, he commenced an action in the — court of — county, Ohio, against said C. D. for the recovery of money, and filed in said cause his affidavit and undertaking with the clerk of said court, and procured an order of attachment which was duly levied on the property belonging to the said C. D., to wit: [*State the property.*]

On the — day of —, 18—, said C. D. applied for a delivery of said property to him, and, together with said V. as his surety, executed his bond to this plaintiff, conditioned that said property should be properly kept and taken care of and delivered to said sheriff on demand, or so much thereof as might be required, to be sold on execution to satisfy any judgment which might be recovered against him in the action, or that he would pay the appraised value thereof, not exceeding the amount of judgment and costs, a copy of which bond is hereto attached, marked "Exhibit A."

Said property was, on the — day of —, 18—, duly appraised at — dollars.

Said written undertaking was delivered to the sheriff of said county and approved by him, and said property delivered to said C. D.

That such proceedings were thereafter had in said cause that this plaintiff recovered a judgment for — dollars, and his costs taxed at — dollars, and a judgment in the attachment proceedings for the sale of said property, and an order of sale and execution was duly issued thereon.

That the sheriff of said county, after receiving said order of sale and execution, demanded the delivery of said property to him [*or, enough of said property to satisfy said judgment, if there is more than enough for that purpose*], but said C. D. refused to deliver the same, or any part of it.

That thereupon said sheriff demanded the payment by said C. D. of the appraised value thereof [*or, if the appraised value exceeds the amount of the judgment, said sheriff demanded the payment of said judgment and costs*], which was refused.

That no part of said judgment and costs has been paid.

Wherefore the plaintiff asks judgment for — dollars and all other proper relief.

[*Copy of undertaking.*]

NOTE.— R. S., sec. 5529. See *ante*, sec. 355.

Sec. 366. Petition on building-contract bond.—

On the — day of —, 18—, the plaintiff and the defendant C. D. entered into a contract for the construction of a [*name building*] on the plaintiff's land, defendant to furnish all the material therefor at his own expense, for which the

plaintiff agreed to pay said C. D. — dollars. [*Give as much of building contract as seems necessary.*]

That at the same time, and as part of said contract, said C. D. with his co-defendants executed to the plaintiff a bond (a copy of which is hereto attached marked "Exhibit A"), binding themselves in the sum of — dollars, which said bond was conditioned that [*state conditions*].

That the plaintiff paid said C. D. the sum of — dollars at the time said contract was made, and the further sum of — dollars on the — day of —, 18—, when said — was completed.

That said C. D. constructed said — in accordance with said contract, and procured the material, but did not pay for the same, and the persons from whom said material was purchased demanded payment from plaintiff, which he refused, and they filed mechanics' liens therefor in the recorder's office of the county wherein said — was situated against said building, and the plaintiff was compelled to pay the same, amounting to — dollars; whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

ACTIONS ON COUNTY OFFICIAL BONDS, ETC.

Sec. 367. Petition by the state through the prosecuting attorney against county officer and his bondsmen, to recover money illegally received.—

The plaintiff, by — —, prosecuting attorney in and for — county, Ohio, for a first cause of action against said defendant says:

1. That on the — day of —, 18—, the said J. M. K., W. R. and O. H., at the county of — aforesaid, by their certain writing obligatory of that date, acknowledged themselves to be held and firmly bound unto the state of Ohio in the penal sum of — dollars, which said writing obligatory was and is subject to a condition thereunder written, and which condition is in the words and figures following, to wit: [*Give condition as appears in bond.*]

2. That the said J. M. K. did thereupon take upon himself the duties of the said office of county treasurer of said county of —, and was such treasurer at the times of committing the wrongs hereinafter stated.

3. That on the — day of —, 18—, said J. M. K., as such treasurer, did present to the county commissioners of said county the following account for services as such county treasurer, to wit: [*Statement of services rendered for which compensation was illegally received.*]

4. That on the — day of —, 18—, said J. M. K., as such treasurer as aforesaid, unlawfully received out of the

county funds in the treasury of said county, as compensation for services, as stated in his said account, the said sum of \$—, on account of which the plaintiff, by —, prosecuting attorney, says that the said J. M. K., together with said other defendants, have become and now are indebted unto the state of Ohio, for the use of said county of —, upon the official bond of said J. M. K., a certified copy of which is hereto attached, marked Exhibit "A," in the sum of — dollars.

NOTE.— From *State v. Kelley*, 32 O. S. 421.

Sec. 368. Petition on bond of clerk of courts.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, the defendant C. D., at a general election, was elected clerk of the — court of common pleas in and for the county of —, state of Ohio.

That on the — day of —, 18—, he, with his co-defendants as his sureties, executed to the state of Ohio his bond (a copy of which is hereto attached, marked "Exhibit A"), in the penal sum of — dollars, to secure the faithful performance of his duties as such clerk, which bond the board of county commissioners of said county duly approved.*

[*For failure to issue summons and attachment:*] That thereafter and on the — day of —, 18—, during the term of office of said C. D., the plaintiff filed in his office a petition in said court against one L. O., for the recovery of the sum of — dollars, which was then due from said L. O. to the plaintiff, and filed his affidavit and undertaking, which said C. D. duly approved, for an attachment against said L. O., and requested said C. D. to issue a summons and order of attachment [and tendered him his fees therefor].

That said C. D. wholly neglected and refused to issue said summons and order of attachment.

That at the time said petition, affidavit and undertaking were so filed, the said L. O. had personal and real property of the value of — dollars in said county subject to attachment and execution, and which might and could have been seized under an order of attachment had the same been issued.

That by reason of the failure and refusal of said C. D. to issue said summons and writ of attachment, said L. O. was given an opportunity to and did sell and convey said real estate for a valuable consideration, and to remove from the state of Ohio taking said personal property and the proceeds of the sale of said real estate with him and disposing of the same (and the said L. O. has since become and is now totally insolvent), whereby the plaintiff has lost his entire debt.

[*Or, for a failure to issue execution.*]

[*Commencement, as at *.*] That on the — day of —, 18—, the plaintiff recovered a judgment in said court against

L. O. for — dollars and — dollars costs, which remains in full force and unsatisfied.

That on the — day of —, 18—, during the term of office of said C. D., said L. O. was the owner of personal property, then in said — county, subject to execution, of the value of — dollars, and on said day the plaintiff requested said C. D. to issue an execution on said judgment to the sheriff of said county, and filed in his office a written precipe directing him to issue the same [and tendered him his fee therefor], but he wholly failed and refused to issue said execution.

That by reason of said C. D.'s failure and refusal to issue said execution as directed, the said L. O. was enabled to, and did, dispose of said property, and he became wholly insolvent [*or, one O. R. afterward recovered a judgment in said court against said L. O., caused an execution to issue thereon, levied upon and sold said personal property to satisfy his said judgment, and said L. O. became and still is wholly insolvent.*]

[*Or, for failure to pay over money collected.*]

[*Commencement, as at *.*] That on the — day of —, 18—, the plaintiff recovered a judgment in said court of common pleas of — county, Ohio, against L. O. for — dollars.

That on the — day of —, 18—, said C. D., during his term of office, and as such clerk, collected and recovered from said L. O. — dollars on said judgment.

That on the — day of —, 18—, the plaintiff demanded of said C. D. payment of said sum, less his costs and charges, but he failed and refused, and still fails and refuses, to pay the same or any part thereof, and has converted the same to his own use.

[*Prayer.*]

NOTE.—R. S., secs. 1241, 1326. A clerk cannot issue process until a written precipe is filed. *State v. Coffee*, 8 O. 150. County commissioners may sue on clerk's bond to recover fines, etc. *State v. Sloane*, 20 O. 327. As to suits on bonds for collateral matters in favor of third persons, see *State v. Nichol*, 8 Heisk. 657; *Crews v. Taylor*, 56 Tex. 461.

Sec. 369. Petition on bond of county recorder for negligence in performance of duty.—

[*Caption.*]

That on the — day of —, 18—, the defendant C. D., at a general election, was duly elected recorder of the county of —, state of Ohio, and on the — day of —, 18—, duly executed his bond with the defendants E. B. and D. E. as sureties, which said bond was duly approved by the county commissioners of said county, and deposited in the office of the county treasurer of said county, and said defendant entered upon the discharge of the duties of said office; a copy of which bond is attached as "Exhibit A."

That on the — day of —, 18—, R. O. duly executed and delivered to plaintiff a mortgage on certain real estate

situated in said county to secure the payment of — dollars, which mortgage was a first lien on said real estate and was filed with said C. D. in his said office by plaintiff for record on the — day of —, 18—, with a request that the same be recorded, and the same was by him recorded; but by reason of the negligence of said C. D. the amount stated therein, and for which said mortgage was given, was recorded as — dollars, instead of — dollars, as it was in said mortgage.

Thereafter said real estate was purchased by L. A., who relied upon the record of said mortgage as recorded by said C. D., having no knowledge of the amount in the deed different from that shown by the record.

That plaintiff, by reason of the negligence of said C. D. in recording said deed, was able to collect of said R. O. the sum of only — dollars, and could not recover the balance, to wit, — dollars, as against said real estate in the hands of said L. A., and said R. O. had in the meantime become totally insolvent, and no part of said balance could or can be collected of and from him, and the entire amount thereof, with interest, is now due and unpaid.

[*Prayer.*]

NOTE.—An action may be brought on recorder's bond for his failure to record mortgage. *Fox v. Thibault*, 33 La. Ann. 82.

Sec. 370. Actions on sheriff's bonds.—It is not only the duty of a sheriff who has received money in his official capacity to hold and dispose of the same properly while in his office, but such duty continues beyond his term.¹ Sureties upon a second bond of a sheriff are liable for a default of the latter for money in his hands when he executes a bond for his second term which he fails to pay over.² And failure by a sheriff to pay over money to persons entitled thereto, which he has collected from the state on a cost-bill for the conviction of a person who has been sent to the penitentiary, is a breach of his bond, as the money was received by him in his official capacity, even though not in strict accordance with his statutory duties, and an action will lie on his bond for such default.³

Sec. 371. Petition on sheriff's bond.—

[*Caption.*]

First cause of action:

The said plaintiff avers that the defendant H. H. S. was, on the — day of —, 18—, duly elected to the office of sheriff

¹ *King v. Nichols*, 16 O. S. 80; *bard v. Elder*, 43 O. S. 380-85. See *Brobst v. Skillen*, 16 O. S. 382; *Grif-* form of petition in this case.

5th v. Underwood, 16 O. S. 389; *Sn-* ² *Snider v. Alexander*, 31 O. S. 373.
der v. Alexander, 31 O. S. 378; *Hub-* ³ *State v. Newell*, 2 O. C. C. 208.

of — county, Ohio, for the term of two years from the first Monday in January, 18—, gave bond, was duly qualified, and acted as sheriff of said county, from said last-named date until the — day of —, 18—. That defendants [*naming them*] are the sureties on the official bond of said H. H. S. as sheriff of said county for said term, which bond is in the sum of \$—, and was approved by the board of county commissioners of said county, and filed with the auditor thereof with the oath of said H. H. S. as such sheriff, and approval of said board indorsed thereon, and which bond was conditioned that the said H. H. S., as such sheriff of said county [*state conditions*], a true copy of which bond is hereto annexed, marked "A," and filed herewith.

That on the — day of —, 18—, an action for the partition of certain real estate situate in said county was begun in said court of common pleas, and is numbered — on the docket, wherein one — was plaintiff and —, said plaintiffs and others were defendants, and such proceedings were had in respect thereto that at the — term, 18—, of said court, said court ordered and decreed a partition of said real estate, and the writ of partition was issued and directed by said court to said H. H. S., as sheriff of said county, on the — day of —, 18—; and such further proceedings were had in said action that an order of sale of said real estate was made by said court at said — term, and on the — day of —, 18—, said real estate was sold at public auction, at the door of the court-house in —, Ohio, by said H. H. S., as such sheriff, for \$— to one —, and the hand payment or one-third part of said sum, to wit, the sum of \$—, was received from the purchaser thereof on said day of sale by H. H. S., in his official capacity as sheriff of said county; and at the — term, 18—, of said court, the said sale of said real estate was approved and confirmed by said court, and said H. H. S., as such sheriff, ordered to execute a deed conveying said real estate to said purchaser in fee; and said court also made at said last-named term thereof, and entered on its journal, an order of distribution of said sum of \$—, and therein decreed and adjudged, directed and ordered said H. H. S., as such sheriff, to pay to said plaintiff, out of said \$—, the sum of \$—.

That said plaintiff, shortly thereafter and long before the commencement of this action, made demand of said H. H. S., sheriff as aforesaid, to pay to him said sum of \$—, which he refused and neglected, and still refuses and neglects, to do, and has unlawfully and fraudulently converted the same to his own use and benefit; and there is due plaintiff from defendants on the cause of action herein set forth \$—, with interest thereon from —. Said H. H. S., sheriff as aforesaid, at the expiration of his term of office, did not pay or

turn over to his successor in office said sum of \$—, or any part thereof.

Second cause of action:

[*Make the usual averment.*] And avers that in the said order of distribution of the proceeds of the sale of said real estate, it was decreed by the court, and the said H. H. S., sheriff as aforesaid, was ordered and directed by said court, which judgment, decree and order was entered on the journal thereof, to pay to said plaintiff out of the second payment of the purchase price of said real estate, when said payment named be received by said sheriff, the — part thereof, to wit, \$—; that on the — day of —, 18—, the purchaser at such sale paid to said H. H. S., sheriff aforesaid, the said second payment, amounting to \$—, which said last-named sum was received by said H. H. S. in his official capacity as sheriff of said county; that plaintiff, long before the commencement of this action, made demand on said H. H. S., sheriff, to pay to him said sum of \$—, the — part of said second payment, which he refused and neglected, and still refuses and neglects, to do, and has unlawfully and fraudulently converted the same to his own use and benefit; and he did not, as he was bound in law, at the expiration of his said term of office, pay and turn over to his successor said last-named sum or any part thereof, although demand was made of him by said successor so to do; and there is due plaintiff from said defendants on this second cause of action, \$—, with interest thereon from —, 18—.

Wherefore plaintiff prays judgment against said defendants for \$—, with interest on \$— thereof from —, 18—, and \$— thereof from —, 18—.

NOTE.—Bond, when to be given. R. S., secs. 1203-1205. In an action by transferee of land for surplus arising from a sale by the sheriff, his return reciting receipt of the money is conclusive against him and his sureties. *State v. Ruff*, 33 N. E. Rep. 124 (Ind., 1893). Suit may be maintained against a sheriff and his sureties for a wrongful seizure of property. *Van Pelt v. Littler*, 14 Cal. 194; *People v. Schuyler*, 4 N. Y. 178; *Forsyth v. Ellis*, 20 Am. Dec. 218; *Skinner v. Phillips*, 4 Mass. 69.

Sec. 372. Petition on city marshal's bond.—

[*Caption.*]

That at an election held in the incorporated village of H., in the county of D., in the state of Ohio, on the — day of —, 18—, the said defendant S. H. was duly elected marshal of the incorporated village of H. aforesaid, and thereafter, on the — day of —, 18—, at said county, the aforesaid defendants, S. H. as principal, and M. W. and J. B. as sureties, duly executed a bond in the form prescribed by law, and jointly and severally acknowledged themselves to be held and firmly bound to the state of Ohio in the sum of — dollars, for the payment of which well and truly to be made, thereby jointly and severally bound themselves, their heirs,

executors and administrators, which said writing obligatory was and is subject to a certain condition thereunder written (a copy of which is hereto attached as an exhibit). [*Copy condition or substance.*]

And the said plaintiff herein further avers that said writing obligatory was then and there signed by said defendants M. W. and J. B. as sureties.

Said plaintiff further avers that said writing obligatory was accepted and approved by the mayor and council of said incorporated village of H., according to law, on the said — day of — aforesaid, and that afterwards on said — day of — aforesaid, the said defendant S. H. took upon himself the duties of said marshal of said incorporated village of H., and assumed to act and did act as such marshal from thence forward, up to, and at the time of, the committing of the wrongs and grievances hereinafter set forth and mentioned.

Plaintiff, further complaining of said defendant, says that in fact said defendant S. H. did not faithfully perform the duties of the office of said marshal aforesaid, for that the said defendant S. H., on the — day of — in the year 18—, in said incorporated village of H. aforesaid, and while said writing obligatory was in full force and effect according to the provisions thereof, as said marshall illegally and with force arrested this plaintiff, and then and there, without any reasonable or probable cause therefor, unlawfully imprisoned this plaintiff and unlawfully kept and detained plaintiff in prison there, without any reasonable or probable cause therefor, for the space of — hours next following, and other wrongs then and there did to the said plaintiff, to his damage in the sum of — dollars.

Wherefore plaintiff demands judgment against said defendants for the sum of — dollars.

NOTE.—From *Hart v. Hughes*, Supreme Court, No. 1085, Defiance county. This may be used as a form on bond of policeman. A statutory bond must be conditioned and executed according to all statutory requirements. *Howard v. Brown*, 21 Me. 885. If not good as a statutory bond it may be good as a common-law bond. *Goodrum v. Carroll*, 87 Am. Dec. 564, 566, and note. Imperfect official bonds, see 2 Am. & Eng. Enc. of Law, 466z. If the condition be contrary to the statute it is void. *Id.*, p. 467, and cases cited. The bond of an officer is valid as a common-law bond when regular in all respects, but payable to obligee other than as required by statute. 7 Jones (N. C.), 258; 8 Dev. L. 297; 9 Iredell L. 250; 2 Brock. C. C. 115. But it is provided by statute in Ohio that bonds of municipal officers shall be good if conditioned that the person appointed or elected shall faithfully perform his duties. R. S., sec. 1783.

Sec. 373. Petition on constable's bond.—

[*For failure to account for money.*]

[*Caption.*]

That on the — day of —, 18—, at a general township election, the defendant C. D. was duly elected a constable in

and for the township of —, of the county of —, and state of —; and on the — day of —, 18—, duly executed, with his co-defendants as his sureties, his bond for the faithful performance of his duties as such constable, in the penal sum of \$— [*as in ante, sec. 372*], which bond was duly approved and deposited in the office of the clerk of said township.

That on the — day of —, 18—, the plaintiff recovered before J. P., a justice of the peace of said township, a judgment for — dollars against R. O., which judgment is still in force and unsatisfied.*

That on the — day of —, 18—, said justice duly issued an execution on said judgment to said C. D. as such constable, to be executed, upon which he, as such constable, collected — dollars.

That on the — day of —, 18—, the plaintiff demanded of said C. D., less his costs and charges, the payment of said — dollars, which he failed and refused to pay, and converted to his own use.

[*Or, for failure to levy.*]

[*From *.*] That on the — day of —, 18—, said justice issued to said C. D., who was then and there acting as such constable, on said judgment an execution, and delivered the same to him.

That at the time said execution came to the hands of the said C. D. said O. R. owned personal property, subject to execution, in said county, upon which the same could have been levied, sufficient to satisfy the whole of said judgment and costs.

That said C. D. failed and neglected to levy said execution, and on the — day of —, 18—, returned the same wholly unsatisfied [*or, so returned the same indorsed as follows: "No property within my bailiwick whereon to levy. C. D., Constable"*].

Wherefore plaintiff has been damaged in the sum of — dollars.

[*For accepting insufficient delivery bond.*]

[*From *.*] That on the — day of —, 18—, said J. P. issued an execution on said judgment to said C. D., who was then and there acting as such constable, and delivered the same to him.

That said C. D. on the — day of —, 18—, levied said execution upon personal property of the said R. O. of sufficient value to satisfy said judgment, contract, costs and accruing costs; and on the — day of —, 18—, said R. O. tendered to said C. D. a delivery bond with L. A. as surety thereon, conditioned to deliver to said C. D. said property whenever demand was made therefor, and demanded a redelivery of said property to him, which said bond said C. D.

accepted and approved and returned said property to said R. O.

That on the — day of —, 18—, said personal property was destroyed by fire, and said R. O. then had and now has no other property upon which said execution could then or now be levied, and he is wholly insolvent.

That said L. A., at the time of execution of said delivery bond, was and still is wholly insolvent.

That said judgment, interest and costs are wholly unpaid.

[*Prayer, etc.*]

NOTE.—R. S., sec. 1516. Justice of the peace has no jurisdiction in actions on bonds. *Hornbuckle v. State*, 37 O. S. 381. The seizure of wrong goods is a breach of bond for which action lies. *State, etc. v. Jennings*, 4 O. S. 418, in which a form of petition is given. Receiving and filing a constable's bond and the officer's acceptance estops the trustees from denying acceptance. *Barret v. Reed*, 2 O. 409; *Royer v. Pugh*, 1 Disn. 443.

Sec. 374. Petition on bond of justice of peace.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, at a general election for the township of —, county of —, Ohio, the defendant A. B. was duly elected a justice of the peace in and for said township; and thereafter on the — day of —, 18—, entered into a bond as required by law in the sum of \$—, with C. D. and E. F., defendants herein, as his sureties, which said bond was approved by the trustees of said township, and filed with the township clerk. [*Set forth conditions after manner in ante, sec. 372.*]

[*For failure to issue execution.*]

That on the — day of —, 18—, and during his term of office, the plaintiff recovered a judgment before said C. D. against R. O. for — dollars and costs taxed at — dollars, which now remains of record on the docket of said C. D. unsatisfied and unappealed from.

That on the — day of —, 18—, the plaintiff requested said C. D. to issue an execution on said judgment, but he failed and refused, and still fails and refuses, to do so.

That at the time the relator requested said C. D. to issue an execution [*or, at the time said C. D. was required by law to issue an execution*] on said judgment the said R. O. owned in said county personal property of the value of — dollars subject to execution, and if an execution had been issued on said judgment the amount due thereon, with interest, costs and accruing costs, could have been made, but said R. O. has since become totally insolvent, and said judgment, interest, costs and accruing costs are now unpaid.

[*Or, for failure to pay over money collected.*]

[*Commencement as at *.*] That afterward, to wit, on the — day of —, 18—, said R. O. paid said C. D., as such justice, the amount of said judgment, to wit, — dollara.

That on the — day of —, 18—, the plaintiff demanded of said C. D. the payment thereof to him, but he has failed and refused to pay the same, or any part thereof, and has converted the same to his own use.

NOTE.—Requirement as to bond. R. S., secs. 579-80. There need not be an express approval of a justice's bond to bind the parties. *Place v. Taylor*, 23 O. S. 817-20. As to failure to enter judgment see *Stallcup v. Baker*, 18 O. S. 544. Neglect to issue execution is a breach of his bond. *Gaylor v. Hunt*, 28 O. S. 255. It must be a joint suit against all the obligors in the bond. *Aucker v. Adams*, 28 O. S. 543.

Sec. 375. Actions on guardian's bonds — Pleading.— A guardian's bond is not invalidated by any informality in the bond itself, or in the appointment of the guardian;¹ nor is it necessary that a previous liquidation of the amount due from the principal be made before an action can be maintained against the sureties;² but a right of action on a bond against the sureties will not accrue until the amount due from the guardian has been first ascertained by a settlement of his accounts.³ A suit in equity on a guardian's bond to compel an account cannot be maintained unless the jurisdiction of the probate court was ineffectual, which fact must be set forth in the petition, otherwise it will be assumed that it does not exist;⁴ and the rule is not different as to a delinquent guardian who is absent from the state and his residence unknown.⁵ It cannot be urged as a defense by the sureties that the minor neglected to bring suit to compel his guardian to settle his accounts, and that one of the sureties has in the meantime become insolvent.⁶ The refusal of a guardian to pay over money in his hands to a minor or his attorney after the guardianship has ceased does not constitute a breach which will give a right to the minor by next friend to bring suit against the surety on the bond;⁷ nor is a guardian who himself uses his ward's money guilty of a breach if he has the money to pay over on a legal demand.⁸ The failure, however, of a guardian to settle his accounts within the time prescribed by law, or to pay

¹ R. S., sec. 6262.

⁴ *Gorman v. Taylor*, 48 O. S. 86.

² *State v. Humphrey*, 7 O. 223, 224.

⁵ *Schwab v. Rappold*, 12 W. L. R.

³ *Newton v. Hammond*, 88 O. S. 197.

430; *Critchett v. Hall*, 56 N. H. 324; ⁶ *Newton v. Hammond*, 88 O. S.

Connolly v. Weatherly, 33 Ark. 658; 430.

Chapman v. Chapman, 32 Ala. 106;

⁷ *Favorite v. Booher*, 17 O. S. 543.

O'Brien v. Strang, 42 Ia. 613.

⁸ *Case v. State*, 10 W. L. J. 163.

over to the ward after arriving at age the amount due him,¹ are clear breaches of his bond. Where a guardian has given two bonds and sureties upon the first have been released, the liability of both sets of sureties for a conversion of funds by the guardian will depend upon when they were received and when embezzled, the rule being that the sureties on the bond which was in full force and effect when the guardian received the money and converted it to his own use are liable therefor.² But where money has been received by a guardian from the sale of real estate, and a special bond is given to cover the money so arising, from which one of the sureties is released and a new bond executed, and default arises upon resignation of the guardian by his failure to pay over the amount due his ward, the sureties on the second bond are liable without regard to the source from which the money came into his hands.³

Sureties will not be exonerated from a default of a guardian by reason of the fact that he resigns and removes to another state, where he is reappointed, files an account and settles upon a different basis than in the state of his original appointment.⁴ Although an allegation that there has been a settlement of a guardian's account be necessary,⁵ yet an omission thereof will, in the absence of objection, be disregarded if the evidence disclosed shows that such was the fact.⁶ In a petition on a guardian's bond containing a recital of the appointment by the proper authority, the obligors are estopped from denying the fact thus recited, or from questioning the validity of the appointment.⁷ Where conversion of a ward's money is charged, payment in whole or in part may be shown under a general denial,⁸ and it may also be shown that an ap-

¹ *Meier v. Harancourt*, 8 W. L. B. 29. sets of sureties, see *Corrigan v. Foster*, 51 O. S. —; 31 W. L. B. 275.

² *Eichelberger v. Gross*, 43 O. S. 549. In such cases parol evidence is admissible to show when the money was received and when embezzled. It has been held that sureties on an additional or second bond are liable for failure to pay over money whether received prior or subsequent to the bond. *Case v. State*, 10 W. L. J. 163. As to liability of different

³ *Tuttle v. Northup*, 44 O. S. 178. See *Moody v. State*, 84 Ind. 432.

⁴ *Penn v. McBride*, 1 O. S. 285.

⁵ *State v. Humphreys*, 7 O. 224.

⁶ *Meier v. Harancourt*, 8 W. L. B. 29.

⁷ *Shroyer v. Richmond*, 16 O. S. 455; *Douglass v. Scott*, 5 O. 198; *Hudson v. Winslow*, 35 N. J. L. 437; *Bates' Pldg.* 360, and cases cited.

⁸ *State v. Roche*, 94 Ind. 372.

plication of the funds has been made pursuant to orders of the court;¹ and where it is alleged that a guardian's bond has been mislaid or lost, it may be shown under a general denial that the defendants never executed the alleged bond.²

Sec. 376. Petition on guardian's bond.—

[*Caption.*]

Plaintiff says that on the — day of —, 18—, the defendant C. D. was duly appointed by the probate court of — county, Ohio, guardian of the estate of A. B., the plaintiff, then — years of age. That said C. D. as such guardian entered into a bond, as required by law, in the sum of \$—, with W. K. C. and R. M. as sureties, which said bond was duly approved by said court, and was upon the condition that the said C. D., as such guardian, should discharge with fidelity the trust reposed in him and render an accurate statement of his transactions, with a just account of the profits arising and accruing from the real and personal estate of his said ward and deliver up the same to the court when thereunto required, a copy of which bond is hereunto attached marked "Exhibit A."

[*2. For failure to pay money to ward.*]

Plaintiff alleges that he has arrived at the age of maturity; that on the — day of —, 18—, the said defendant, C. D., filed in the probate court of said county his final account as such guardian, which said account was adjudged and settled by said court on the — day of —, 18—, and that said court found that there was due A. B., his ward, this plaintiff, the sum of \$—. Plaintiff has demanded payment of said sum in his hands as such guardian, but he has failed to pay said sum of — dollars, or any part thereof, or to account for the same in any way, and has converted the same to his own use.

[*Or, 3. Where guardian has removed from state and failed to render account.*]

That in —, 18—, the said C. D. removed from his residence in — county, Ohio, to the state of N., where he then located and still remains. That since his residence in said state said guardian has refused and neglected to render any statement of his transactions to the probate court or to plaintiff; and that plaintiff has been unable to demand of said guardian the amount due him.

[*Averment when surety is deceased.*]

That on the — day of —, 18—, B., one of the sureties on said bond, died, and on the — day of —, 18—, R. was duly appointed administrator of his said estate by the probate court of — county, Ohio, and is still acting as such administrator, with assets in his hands to pay the debts of such estate.

That on the — day of —, 18—, plaintiff presented his

¹ State v. White, 127 Ind. 451.

² Millikan v. State, 70 Ind. 310.

claim to said R. as such administrator, and said administrator rejected said claim and declined and refused to pay the same unless a judgment was rendered against him as such administrator for the amount of said claim.

Wherefore plaintiff asks judgment against said defendants, etc.

NOTE.—Surety is responsible for delinquencies occurring before he is relieved and a new bondsman substituted. *Bell v. Rudolph*, 13 S. Rep. 153 (Miss., 1892). It has been held that the bond of a guardian need not strictly follow the provisions of the statute. *Brunson v. Brooks*, 68 Ala. 248. Sureties on guardian's bond may on payment of the debt due the ward be subrogated to the rights of the ward. *Adams v. Gleaves*, 10 Lea, 367. It is held that a cause of action does not arise until after a final settlement by the guardian, and that the statute of limitations begins to run from that time. *Moore v. Nichols*, 39 Ark. 145; *Connelly v. Weatherby*, 33 Ark. 658.

Sec. 377. Petition on guardian's bond by succeeding guardian.—

The said plaintiff, W. A. K., as guardian of C. F. C., for cause of action herein says that on or about the — day of —, 18—, the said defendant, S. S. B., was appointed by the probate court of — county, Ohio, guardian of the said C. F. C., who was then a resident of said county, an infant. That on the said — day of —, 18—, the defendants made and delivered to the judge of the said probate court their writing obligatory of that date, and thereby bound themselves jointly and severally to pay to the state of Ohio the sum of — dollars, a copy of which bond is hereto attached as an exhibit; that on the same day the bond and sureties were approved by said court.

That the said bond was and is subject to the condition that it should become void if the said S. S. B. should faithfully discharge his duties as such guardian, and otherwise to be and remain in full force. That on the — day of —, 18—, the said S. S. B. tendered his resignation as such guardian, which was accepted by the probate court, and said defendant ordered to file his final account, which was accordingly done. That thereupon, on the — day of —, 18—, the plaintiff herein was appointed by said probate court to be guardian of said C. F. C. as a lunatic or person of unsound mind [or, minor], and on that day gave bond, with sureties, according to law, which was approved by the court, and he entered upon the discharge of his duties as such guardian. That during the time that the said S. S. B. was so acting as guardian as aforesaid, there came into his hands of the moneys and estate of the said C. F. C. the sum of — dollars; that said S. S. B., on the — day of —, 18—, filed his final account as such guardian in said probate court, which was on the — day of —, 18—, settled, and it was then found and adjudged by said probate court that there was, and in fact

there then was, in the hands of said S. S. B. of the moneys aforesaid, the sum of — dollars, interest being computed to the said last-named day, and which sum the said probate court then ordered the said S. S. B. forthwith to pay to this plaintiff. That on the — day of —, 18—, the plaintiff, as such guardian, demanded of the said S. S. B. the payment of last-named sum; but he has not paid the same or any part thereof, except the sum of — dollars.

The plaintiff demands judgment against the defendants for the sum of — dollars with interest from —.

NOTE.—From *Kaine v. Bell*, 86 O. S. 462.

Sec. 378. Actions on indemnity bonds.—In an action on a bond of indemnity conditioned that the principal obligor shall pay any judgment which may be recovered against the obligee, it is not necessary to either aver or prove payment of the judgment by the obligee prior to bringing the suit.¹ It seems to be the settled rule that if a party sign a contract to indemnify simply, and nothing more, damages must be shown before he is entitled to bring suit; but if he has affirmatively contracted to do a certain act, it is no defense to say that he has not been indemnified, but his right of action is complete when he becomes liable to pay.² In an action on an indemnity bond taken by a sheriff in attachment proceedings, it may be urged as a defense thereto that the officer by collusion and fraud permitted a judgment to be entered against him.³ It being a rule of pleading that a complainant need not anticipate a negative matter of defense, if a plaintiff in a suit on an indemnity bond for the recovery of what he has been compelled to pay has no means of reimbursement, or has been reimbursed, he need not aver the non-existence of any such facts, as that would be matter of defense.⁴

Sec. 379. Petition on indemnity bond.—

Plaintiff says that the said defendant, on the — day of —, 18—, caused an execution to be issued from the — court of — county, upon a judgment which he had theretofore

¹ *Martin v. Bolenbaugh*, 43 O. S. 508; 8 Nev. 121; *McBeth v. McIntyre*, 57 Cal. 49; *Gregory v. Hartley*, 6 Neb.

² *Wilson v. Stilwell*, 9 O. S. 467; 856.

Port v. Jackson, 17 John. 239; *Mann v. Eckford*, 15 Wend. 502; *Ex parte Negus*, 7 Wend. 449; *Lathrop v. Atwood*, 21 Conn. 117; *Jones v. Childs*, 54 N. W. Rep. 252 (1893).

³ *Mihalovitch v. Barlass*, 36 Neb. 491; 54 N. W. Rep. 826 (1893).
⁴ *Romer v. Contmer*, 53 Minn. —; 54 N. W. Rep. 252 (1893).

recovered in said court, against ———, which execution was delivered to this plaintiff, who was then sheriff of said county. That plaintiff at the request of the defendant levied said execution upon certain personal property as goods belonging to the said ———, but which were afterwards claimed by one ———. That the said defendant, in consideration of and upon the promise of this plaintiff to sell said goods, executed and delivered to plaintiff a bond of indemnity conditioned that [*here state the substance of the conditions*] a copy of which bond is attached as an exhibit and filed herewith. That thereupon said plaintiff sold said goods under said execution and paid the proceeds thereof to the said defendant.

That thereafter, on the ——— day of ———, 18—, said ——— brought an action against this plaintiff for the recovery of the value of said goods so levied upon under said execution, and on the ——— day of ———, 18—, recovered a judgment against this plaintiff for the sum of ——— dollars, the value of said goods, and ——— dollars costs, which said sum of money, together with the additional sum of ——— dollars as necessary expenses in defending said action, this plaintiff was compelled to pay. That plaintiff duly notified the said defendant of the pendency of said action against him by the said ———, and that judgment was so rendered against plaintiff in said cause as aforesaid, and demanded of said defendant that he be reimbursed for the amount of said judgment so as aforesaid rendered against and paid by him, but that said defendant had failed and neglected to pay the same and save this plaintiff harmless as provided in said bond.

Wherefore plaintiff asks judgment against said defendant in the sum of ——— dollars.

NOTE.— Notice should be averred. *Reynolds v. Magness*, 2 Ired. 126. The object in giving notice of the action is that the indemnitor shall be bound as to amount of damages. *Miller v. Rhoades*, 30 O. S. 494.

Sec. 380. Actions on injunction bonds.—An injunction bond must be construed strictly in favor of the sureties,¹ as no action can be maintained thereon except in accordance with its terms; and this is true with respect to the principal as well as the sureties.² Where it is conditioned to pay all the costs if it finally be decided that the injunction ought not to have been granted, a dismissal of the action on motion because the summons has not been served, and the injunction dissolved, will not constitute a breach for which an action will lie against the sureties.³ Under a statute requiring execution to be issued and returned *nulla bona* before the successful party may bring suit on an appeal or injunction bond, it has been considered necessary to

¹ *Williamson v. Hall*, 1 O. S. 190;
Hall v. Williamson, 9 O. S. 17.

² *Railway Co. v. Burke*, 54 O. S. 98.

³ *Krug v. Bishop*, 44 O. S. 221.

aver that such execution has been so issued and returned *nulla bona*.¹ Where the provisions of an injunction are that obligors will pay all money and costs due and to become due, and the same is dissolved, the person restrained may sustain an action on the bond for the recovery of such damages as he may sustain by reason thereof;² and the obligors are sometimes liable though an action enjoined is never tried on its merits.³ But the general rule is that sureties cannot be compelled to pay until it has been decided that the injunction ought not to have been issued.⁴ A petition on a bond for injunction which states that the judgments have been in all things performed, and that the claim was then due, sufficiently shows the final disposition of the suit, and that action is not prematurely brought.⁵ Attorney's fees in procuring a dissolution of the injunction may be collected as part of the damages sustained; and it will be sufficient to aver that a mere liability has been incurred.⁶

Sec. 381. Petition on injunction bond.—

Plaintiff says that the defendant, on the — day of —, 18—, commenced an action in the — court of — county, Ohio, against this plaintiff, and obtained a temporary order to restrain this plaintiff from [*here state the substance of the order*]; that after the granting of said order and to secure the said injunction against the plaintiff, said defendant entered into a writing obligatory, with — — as surety (a copy of which is hereto annexed as an exhibit), which was approved by and filed with the clerk of said court, thereby binding the said defendants to the plaintiff in the sum of — dollars, which said sum was so fixed by said court, the conditions of which bond were that [*here state the substance of the conditions*].

Plaintiff further says that, upon the trial of said cause, said — court of — county, on the — day of —, 18—, decided that said temporary injunction ought not to have been granted, and dissolved the same; that by reason of the granting of said temporary order, plaintiff has sustained damages in the sum of — dollars in this, to wit: [*here state special grounds of damages*].

Wherefore he asks judgment, etc.

NOTE.—Plaintiff may recover the value of his time lost. *Muller v. Fern*, 35 Ia. 420; *Skrainka v. Oertel*, 14 Mo. App. 474; 30 Mo. App. 30; 79 Mo. 80.

¹ *Hillyer v. Richards*, 18 O. 147. But there is no such statute in Ohio.

² *Roberts v. Dust*, 4 O. S. 502.

³ *Bishop v. Bascoe*, 7 W. L. B. 343.

⁴ *Krug v. Bishop*, 44 O. S. 221.

⁵ *Midland Ry. v. Stevenson*, 33 N. E. Rep. 254 (Ind., 1893).

⁶ *Noble v. Arnold*, 28 O. S. 264.

Sec. 382. Petition on replevin bond.—

On the — day of —, 18—, the defendant commenced an action in the court of — against this plaintiff to recover possession of certain personal property. That in said action said defendants entered into an undertaking to this plaintiff (a copy of which is hereto attached), and thereby became bound to the plaintiff in the sum of — dollars, the conditions of which bond were that the said — would duly prosecute his said action and pay all damages which might be awarded against him. That upon trial of said cause in the said court of —, on the — day of —, 18—, judgment was rendered against the defendant herein, wherein it was ordered that this plaintiff should have said goods and chattels returned to him, or, in case a return could not be had, to recover from said defendant the sum of — dollars. That said defendant has not so returned said property or paid any part of said judgment. That on the — day of —, 18—, an execution was issued to the sheriff of — county upon said judgment, which was returned wholly unsatisfied, and no part of said judgment has been paid.

Wherefore plaintiff prays judgment in the sum of — dollars.

NOTE.—R. S., sec. 5819, Am. 88 O. L. 273.

Parties.—Sheriff may be party plaintiff. *Cheseldine v. Mathers*, 2 Disn. 502. See *Schafer v. Marienthal*, 17 O. S. 183. Defendant as real party in interest may be substituted as plaintiff. *Hanna v. Petroleum Co.*, 23 O. S. 622; R. S., sec. 5018.

Execution.—A suit cannot be instituted until an execution issued in favor of the defendant in the action has been returned unsatisfied. R. S., sec. 5830.

Sec. 383. Petition on title bond.—

[*Caption.*]

That on the — day of —, 18—, the plaintiff purchased from the defendant C. D. certain real estate described as follows: [*description*], for which he agreed to pay defendant the sum of — dollars on the — day of —, 18—.

That in consideration thereof said C. D., with his co-defendants, executed to the plaintiff said bond, conditioned that he would, on payment of said purchase-money at the time specified therein for payment, convey said real estate to the plaintiff free from incumbrance by good and sufficient warranty deed.

That on the — day of —, 18—, the plaintiff tendered to the said C. D. said purchase-money, and demanded a deed for said real estate, but he failed and refused and still refuses to make said deed, whereby the plaintiff is damaged in the sum of — dollars, which is due and unpaid.

Sec. 384. Answers and defenses to actions on bonds.—A bond is not invalidated by an alteration made by consent of the parties;¹ nor by the omission of the name of one of the sureties in the body of the instrument;² nor by failure to fill blanks in a printed form unless material,³ as the time has gone by when courts will listen to trivial and verbal inaccuracies in solemn instruments.⁴ It is held, however, that an entire blank, with signatures and seals, even with authority to fill up, is void;⁵ and where the word “dollars” is omitted in a bond, an action cannot be maintained thereon by averring that it meant so many dollars.⁶ A bond executed in blank as to the penalty, which is presented to and approved by the court in the absence of the sureties, and the blank is filled without their consent, is void unless there be an express authority to insert the same.⁷

It was a rule at common law, and it has so been held in Ohio and other states, that upon general principles the want of consideration could not be pleaded as a defense to an action upon a bond, and that fraud could not be urged as a defense, except to the execution of the instrument.⁸ But it was afterwards provided by statute⁹ that failure of consideration in a sealed instrument could be set up under which a fraudulent consideration could be shown, which is, in fact, failure of consideration.¹⁰ Sureties upon the bond of a treasurer of a corporation cannot urge as a defense that the funds were acquired by an *ultra vires* transaction;¹¹ nor can a surety set up a defense that the obligee had agreed to cancel the same in consideration of certain acts to be done by the principal, without alleging performance or an offer to perform such

¹ *Spencer v. Buchanan*, W. 588; John. 177; 18 John. 480; 8 Wend. Tiernan v. Fenimore, 17 O. 545. 615; 9 Cowen, 307; *McCarty v.*

² *State v. Boring*, 15 O. 507; *Fam-menler v. Anderson*, 15 O. S. 478; *Home Ins. Co. v. Watson*, 59 N. Y. McLain v. Simington, 37 O. S. 484; 390.

Partridge v. Jones, 38 O. S. 375; ³ *Swan*, 685.
Ahrend v. Ordoins, 125 Mass. 50.

⁴ *Bank v. Bartlet*, W. 741.

⁵ *Knisely v. Shenberger*, 7 Watts, 193.

⁶ *Ayres v. Harness*, 1 O. 368.

⁷ *Spencer v. Buchanan*, W. 583.

⁸ *State v. Boring*, 15 O. 507.

⁹ *Reynolds v. Rogers*, 5 O. 169; 2

¹⁰ *Greathouse v. Dunlap*, 3 McLean, 806 (1843). And such a defense can be made under the statute as it now exists. R. S., sec. 5071. See *Judy v. Louderman*, 48 O. S. 562.

¹¹ *Juegling v. Arbeiter Bund*, 4 W. L. B. 463.

acts;¹ nor can it be shown in an action on the bond of a sheriff that goods levied upon do not belong to the judgment debtor;² nor can it be urged that suit is brought for the use of the wrong parties;³ nor can officers of a township set up as a defense want of authority to issue a bond where it contains a recital that it was authorized as required by law.⁴ An answer which alleges that the breaches complained of were committed by the principal obligor with full knowledge of the plaintiff and by his advice and consent is too indefinite to justify a breach of official duty.⁵ An answer to only one breach of a bond when two are alleged in the petition is not good, as each allegation of a breach is treated as a distinct action.⁶ Where it is alleged that defendants "duly signed, executed and delivered their certain bond," an answer of the surety to the effect that a bond similar in tenor and effect was signed by the defendant does not deny its execution, and hence it cannot be shown that the bond was not filled out and sealed when the defendants subscribed their names thereto.⁷ A defense that an alleged breach was not committed as agent cannot be made to an action on the bond of an insurance agent where the breach alleged is failure to pay over moneys received by virtue of his appointment; but the answer must contain such a statement of facts as will show whether or not the acts were outside the agency.⁸ Where the defense is that the signatures of bondsmen were procured by misrepresentation, the answer should contain an allegation to that effect before proof thereof can be admitted.⁹ It is a

¹ *Kempshall v. East*, 127 Ind. 320; s. c., 26 N. E. Rep. 837.

² *People v. Reeder*, 25 N. Y. 302.

³ *Greser v. People*, 36 Ill. App. 415.

⁴ *Hudson v. Winslow*, 85 N. J. L. 487.

⁵ *State v. Daugherty*, 33 Ind. 350.

⁶ *People v. McClellan*, 137 Ill. 352; 27 N. E. Rep. 181 (1891). Each breach assigned in an action on a bond being a separate paragraph, an answer in bar of the whole action, or a demurrer to the whole complaint (*Colburn v. Arnold*, 47 Ind. 310; *Ren v. Olden*, 24 Ind. 56), which is not suf-

ficient as to one of the breaches, will not be good (*State v. Roche*, 94 Ind. 372; *Mustard v. Hopps*, 39 Ind. 324); and where there is but one condition in a bond, and hence only one breach, if several breaches be assigned, the remedy is by motion to strike out and not by demurrer. *Boden v. Dill*, 58 Ind. 278.

⁷ *Insurance Co. v. Bauer*, 11 N. Y. S. 372.

⁸ *Insurance Co. v. Baker*, 34 W. Va. 607; s. c., 12 S. E. Rep. 834.

⁹ *Foley v. Schiedemantel*, 17 N. Y. S. 663.

good defense by sureties upon the bond of an agent to show that at the time the sureties executed the bond the pledgee or person to whom the bond is payable, in order to induce them to sign the bond, withheld information in his possession to the effect that the agent was then in default.¹ Under the plea of *non est factum* it cannot be shown that the bond was delivered to the principal obligor upon condition that it was not to be in force until another surety signed it, and that the bond was delivered without the procurement of such additional surety. Such a defense must be specially pleaded.² But where a bond is regular on its face, apparently executed by all whose names appear therein, and was actually delivered to the principal without any stipulation, reservation or condition, it cannot be avoided upon the ground that it was signed upon the condition that it should not be delivered until he had procured the signature of another. The question of the execution of the bond may be put in issue by pleading *non est factum* generally; but in order to separate the law from the facts, and to show any special ground why it is not the deed of the defendant, such facts must be specially pleaded.³ A defense to an action on a bond that the plaintiff had accepted certain notes in full settlement of all claims is not inconsistent with the plea of *non est factum*, and is therefore good.⁴ But a defense that the sureties are relieved by reason of wilful concealment by the plaintiff of certain facts is inconsistent with the plea of *non est factum*.⁵

Sec. 385. Answer of surety to suit on administration bond claiming equitable set-off against claim of distributee.

First defense: This defendant says he denies that at the settlement of the accounts of A. P., as administrator of the estate of A. R. C., deceased, by the probate court of said county, on the — day of —, 18—, the said court found the sum of \$— in his hands, and adjudged that the same should be by him distributed according to law, as stated in the petition

¹ *Dinsmore v. Tidball*, 34 O. S. 411; *Bank v. Owen*, 101 Mo. 558; *Fire Ins. Co. v. Thompson*, 68 Cal. 208; *Sooy v. State*, 39 N. J. L. 142; *Franklin Bank v. Stevens*, 39 Me. 532; *Wayne v. Bank*, 52 Pa. St. 342.

² *Am. Button Hole, etc. Co. v. Burblack*, 35 W. Va. 647.

³ *Am. Button Hole, etc. Co. v. Burblack*, *supra*.

⁴ *Accident Ins. Co. v. Baker*, 34 W. Va. 667.

⁵ *Accident Ins. Co. v. Baker*, *supra*.

of the plaintiff, but says that on said — day of —, 18—, the said court made an order of which the following is a copy: "A. P., administrator of the estate of A. R. C., deceased, having filed herein his third and final account, duly verified by his oath, and it having been duly advertised and now come on for hearing, upon careful examination the same is found correct and balanced; said account is now approved, confirmed and ordered to be recorded;" which said order was duly entered on the journal of said court, and was not then, nor within eight months thereafter, excepted to or appealed from by plaintiff or other person.

Second defense: For a second defense defendant says that N. C., now deceased, was a co-obligor in the bond, a copy of which is contained in the petition of plaintiff, and that said A. P. was administrator on her estate, as well as upon the estate of said A. R. C., deceased; that the said plaintiff is a son of said A. R. C. and N. C.; that said P., ostensibly as administrator of N. C., deceased, paid to said plaintiff, through G. D. M., Esq., his attorney, the sum of \$—, of moneys collected by said M. in the case of A. P., administrator of the estate of A. R. C., deceased, against W. M. S., lately pending in the court of common pleas of said — county, which said sum was part of the assets of the estate of said A. R. C., which came into the hands of said P. as administrator of his estate; that the said sum was paid to said plaintiff some time in the year 18—, and he denies that there is due to the plaintiff the said sum of \$—, with interest, as claimed in the petition of plaintiff.

NOTE.—From *Fisher v. Cassidy*, 49 O. S. 421. A surety against whom suit is brought on an administrator's bond may have an equitable right of set-off, as against the heirs of a co-surety whose estate has been settled and the money distributed to such heirs, of the amount which such heirs received from the estate of such co-surety. *Fisher v. Cassidy*, *supra*; *Camp v. Bostwick*, 20 O. S. 337. See *Case v. Cassidy*, 72 N. Y. 133; *McConnell v. Scott*, 15 O. 401.

Sec. 386. Answer to action on appeal bond.—

Defendants S. B., M. E. M., executor of the estate of S. W. M., and H. G. M., now come, and for answer say that they admit the execution of the bond in the petition stated, the recovery of judgment by H. and wife for costs in the action named in said bond, the issuing of execution to collect the costs, and the return thereof "no money made;" but they deny expressly that the amount of costs recovered is truly stated in the petition, and deny that the judgment for costs in favor of said plaintiffs H. and wife, in said action, exceeded the sum of \$—, and they deny each and every other fact stated in said petition except such as are hereinafter expressly admitted.

CHAPTER 24.

BREACH OF PROMISE OF MARRIAGE.

Sec. 387. Petition in actions for breach of promise.	Sec. 392. Answer of refusal to marry.
388. Petition for breach of promise.	393. Answer of bad character of plaintiff.
389. Petition for not marrying in a reasonable time.	394. Answer claiming misconduct of plaintiff.
390. Petition where defendant has married another.	395. Answer setting up conditions imposed by plaintiff not a part of original promise.
391. Breach of promise — The answer.	

Sec. 387. Petitions in actions for breach of promise.

—A breach of promise of marriage is regarded by some authority as a tort,¹ but, unlike other cases of tort, it does not survive the promisor unless there has been some special damage.² A mutual contract of marriage need not be in writing nor in any particular form.³ There are some courts which have held that an oral contract of marriage not to be performed in one year is void,⁴ but this rule seems hardly applicable to such contracts; and, especially where parties understand that the promise is not to be performed in one year, it is not within the statute of frauds.⁵ Where no time is fixed for the performance of the marriage ceremony, the law presumes that it will be in a reasonable time;⁶ and there can be no default in such case until an offer is made to fix a time and place to consummate the agreement; nor can an action be maintained unless the plaintiff pleads

¹ Glasscock v. Shell, 57 Tex. 215.

² Grubb v. Sult, 32 Gratt. 208; Shuler v. Millsap, 71 N. C. 297; Wade v. Kalbfleisch, 58 N. Y. 282; Lattimore v. Simons, 12 S. & R. 183; Hayden v. Vreeland, 18 Am. Rep. 123.

³ Kelley v. Riley, 106 Mass. 339; Linscott v. McIntire, 15 Me. 201; Homan v. Earl, 53 N. Y. 267; Cole v. Holliday, 4 Mo. App. 94.

⁴ Nichols v. Weaver, 7 Kan. 378;

Parris v. Strong, 51 Ind. 339; Derby v. Phelps, 2 N. H. 515.

⁵ Lawrence v. Cook, 56 Ma. 187; Wiggins v. Kiezer, 6 Ind. 252.

⁶ Carver v. Smith, 15 M. & W. 189; Adams v. Byerly, 123 Ind. 368; Blackburn v. Mann, 85 Ill. 222; Cole v. Holliday, 4 Mo. App. 94.

and proves an offer, and failure of the defendant to comply therewith.¹ It is not consistent with public policy to compel a contract of marriage to be specifically performed,² so the wounded party is confined to a remedy in damages.³ Such an action will lie on a promise of marriage against one who was married at the time of making it,⁴ and will accrue at once when there is any conduct on the part of the defendant amounting to a repudiation,⁵ although the time set for the marriage is still in the future.⁶ As the law presumes that all contracts are made by persons competent to contract, it is not necessary to aver the age of either party.⁷ The same rule is applicable to marriage contracts as to others where one of the parties is of full age and the other an infant—the former being bound, and the latter having the right to rescind it.⁸ Where a defendant pleads infancy, the plaintiff may be allowed to amend by stating other promises, and a ratification of the first one, after the defendant becomes of age.⁹ Where the petition alleges that the defendant has married another person, or where there is a mutual promise to marry on a certain day, it need not contain an averment that a demand or request was made upon the defendant to fulfill his promise;¹⁰ an allegation of readiness on the part of the plaintiff to fulfill the marriage promise is, however, material.¹¹ Allegations that a promise was made, that it was broken, that an advantageous matrimonial connection was lost, that affections have been disregarded and blighted, feelings lacerated, and spirits wounded, are sufficient to authorize a recovery.¹² Where

¹ *Fible v. Coplinger*, 18 B. Mon. 464; *Wagenseller v. Simmons*, 97 Pa. St. 465.

² *Cheney v. Arnold*, 15 N. Y. 345.

³ *Wightman v. Coates*, 15 Mass. 1.

⁴ *Stevenson v. Pettis*, 12 Phila. 468; *Wild v. Harris*, 17 C. B. 99; *Kelley v. Riley*, 106 Mass. 339; s. c., 80 Am. Rep. 336; *Prescott v. Guyler*, 32 Ill. 312.

⁵ *Adams v. Byerly*, 123 Ind. 368; s. c., 24 N. E. Rep. 130.

⁶ *Burtis v. Thompson*, 42 N. Y. 246. As to other contracts see 60 N. Y. 448; 32 N. Y. 436; 29 Mich. 478.

⁷ *Glasscock v. Shell*, 57 Tex. 215; *Jones v. Layman*, 123 Ind. 569; 24 N. E. Rep. 368.

⁸ *Hunt v. Peake*, 5 Cow. 475; *Canon v. Alsbury*, 1 A. K. Marsh. 76; *Willard v. Stone*, 7 Cow. 22.

⁹ *Schreckengast v. Ealy*, 16 Neb. 510.

¹⁰ *Hunter v. Hatfield*, 68 Ind. 416; *Graham v. Martin*, 64 Ind. 567; *Stevens v. Pettis*, 12 Phila. 468; *Short v. Stone*, 55 E. C. L. 358; *Caines v. Smith*, 16 M. & W. 189.

¹¹ *Graham v. Martin*, *supra*.

¹² *Daggett v. Wallace*, 75 Tex. 352.

a promise of marriage has been made to be fulfilled in the future, and a new one is made upon illicit intercourse that if pregnancy results the contract shall be performed at once, the latter promise does not supersede the original one.¹ It is essential that the facts relied upon as causing damages be fully set forth in the pleading,² and damages for loss of health cannot be allowed unless specially pleaded.³ Where false representations are relied upon by the plaintiff, it is necessary to aver that the defendant knew the same to be false.⁴

Sec. 388. Petition for breach of promise.—

The plaintiff complains of the defendant and says that said defendant entered into a contract with her, in the month of —, 18—, by which it was agreed by and between them that they would get married in the month of — following; and she avers that she made all the necessary arrangements and preparations to consummate said contract, and was ready and willing at the time fixed aforesaid to fulfill the same; but she avers that said defendant wholly failed to fulfill his contract, to the great distress, mortification and disgrace of plaintiff, and that plaintiff still remains unmarried; wherefore she demands judgment for — dollars.

NOTE.— See *Cates v. McKinney*, 17 Am. Rep. 768. Punitive damages may be allowed. *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474; s. c., 1 Am. Rep. 561; *Simpson v. Black*, 27 Wis. 206; *Dryden v. Knowles*, 33 Ind. 148.

Sec. 389. Petition for not marrying in a reasonable time.

[Formal parts.]

Plaintiff alleges that at the request of the defendant, she and said defendant did, on the — day of —, 18—, enter into a mutual promise and agreement to marry each other, but that no definite time was fixed for the consummation of said marriage contract.

Plaintiff has since remained unmarried, relying upon the promise so made by the defendant, and has always since said date been ready to marry defendant, and on the — day of —, 18—, requested said defendant to carry out his contract, which he has wholly failed to do, although a reasonable time has elapsed since the request was made by plaintiff.

[Prayer.]

NOTE.— Plaintiff is entitled to such damages as will place her in as good pecuniary condition as she would have been had the contract been fulfilled. *Cooper v. West*, 3 W. L. B. 430. Evidence as to preparation by procuring

¹ *Kurtz v. Frank*, 40 Am. Rep. 278;

² *Bedell v. Powell*, 13 Barb. 183.

Clark v. Pendleton, 20 Conn. 495.

⁴ *Blattmacher v. Sall*, 7 Abb. Pr. 400.

³ *Glasscock v. Shell*, 57 Tex. 215.

bedding and declarations explanatory thereof shows acceptance of promise. *Wetmore v. Mell*, 1 O. S. 26. Evidence of seduction may be received on the question of damages. *Matthews v. Cribbett*, 11 O. S. 330; *Haymond v. Saucer*, 84 Ind. 8; *Kelley v. Riley*, 106 Mass. 339, *Giese v. Schultz*, 53 Wis. 462; *Daggett v. Wallace*, 75 Tex. 855; *Sherman v. Rowson*, 102 Mass. 399. To enhance damages of plaintiff, evidence is admissible that she announced her engagement to her friends and invited them to her wedding. 47 Cal. 194.

Sec. 390. Petition where defendant has married another.

The plaintiff states that on the — day of —, 18—, she being then unmarried, at the request of the defendant, promised to marry him, and the said defendant at the same time promised to marry her. That the plaintiff, relying upon said promise of the defendant, has remained sole and unmarried; and on the — day of —, 18—, the said defendant postponed the time of the marriage ceremony until —, at which time the said defendant, under some pretext, postponed the performance of the marriage ceremony from time to time, until some time in the month of —; and when the time came the said defendant refused to marry the said plaintiff at that time; and afterwards, the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, after the making of his said promise, to wit, at the several times aforesaid, at the county aforesaid, wrongfully and in violation of his said promise to this plaintiff, said defendant on the — day of —, 18—, married one M. B., by which the said plaintiff has sustained damage to the amount of — dollars, for which she asks judgment.

Sec. 391. Breach of promise — The answer.— The defendant may plead infancy,¹ or that the plaintiff failed to carry out some condition of the promise,² or that the plaintiff has expressly released him;³ and lewd and improper conduct on the part of the plaintiff may be shown under a general denial.⁴ An attempt by a defendant to prove unchaste character before the breach, unless made with reasonable hope of establishing the same, may be taken into consideration on the question of damages to the plaintiff.⁵ The fact that a plaintiff before the

¹ *Rush v. Wick*, 31 O. S. 521; *Canon v. Alsbury*, 1 A. K. Marsh. 56; *Willard v. Cooper*, 5 Sneed, 659; *Hunt v. Peake*, 15 Am. Dec. 475.

² *Gring v. Lerch*, 112 Pa. St. 244.

³ *Shellenbarger v. Blake*, 67 Ind. 75; *Grant v. Willy*, 101 Mass. 356.

⁴ *Kniffer v. McCounell*, 30 N. Y.

285; *Thorn v. Mack*, 42 N. Y. 484; *Southard v. Rexford*, 6 Cow. 254.

⁵ *Duvall v. Fuhrman*, 3 O. C. C. 305; *White v. Thomas*, 12 O. S. 812; *Denslow v. Van Horn*, 16 Ia. 476; *Haymond v. Saucer*, 84 Ind. 39; *Jones v. Layman*, 123 Ind. 569; *Powers v. Wheatly*, 45 Cal. 118; *Fidler v. Mc-*

promise gave birth to a child will not bar the action if the defendant had knowledge thereof, but it may be considered in mitigation of damages;¹ nor can a defendant urge as a defense that the plaintiff had previously contracted to marry another person;² or that he discovered that he could not be happy with her;³ or after a refusal that he renewed his offer;⁴ or that he did not make the promise in good faith;⁵ or that he was married at the time of the promise, if the plaintiff was ignorant of the fact.⁶ And if his repudiation of the contract be based upon the fact of his having a venereal disease, he will nevertheless be answerable in damages if the same be contracted subsequently to his promise of marriage.⁷ A man is not excused from fulfilling his marriage contract, even though unable to comply with all obligations of marriage by reason of ill health, as he may nevertheless secure to his wife a social position and endow her with a wife's interest in his estate.⁸ Mitigating circumstances may be proved even though not pleaded;⁹ and under a general denial, evidence as to habits of intoxication on the part of the plaintiff may be shown by way of mitigation, but not as a defense;¹⁰ and so with evidence as to the ill health of plaintiff.¹¹ An action will not lie in Ohio for a breach of promise of a contract of marriage where the parties are related as first cousins.¹²

Sec. 392. Answer of refusal to marry.—

The defendant for his answer to plaintiff's petition denies

Kinley, 31 Ill. 808; Thorn v. Knapp, 42 N. Y. 474; Reed v. Clark, 47 Cal. 194; Leavitt v. Cutler, 37 Wis. 46. *Contra*, Hunter v. Hatfield, 68 Ind. 416.

¹ Denslow v. Van Horn, 16 Ia. 476; Irving v. Greenwood, 1 C. & P. 350; Woodward v. Bellamy, 2 Root, 354; Sprigg v. Craig, 51 Ill. 288.

² Roper v. Clay, 18 Mo. 353.

³ Coolidge v. Neat, 129 Mass. 146; Sheehan v. Barry, 27 Mich. 217.

⁴ Kurtz v. Frank, 76 Ind. 594; s. c., 40 Am. Rep. 275; Holliday v. Griffith, 32 Ia. 409; Southard v. Renford, 6 Cow. 254; Kelly v. Renfro, 3 Ala. 328.

⁵ Prescott v. Goyle, 33 Ill. 312.

⁶ Kelley v. Riley, 106 Mass. 339; s. c., 30 Am. Rep. 336.

⁷ Allen v. Baker, 86 N. C. 91; s. c., 41 Am. Rep. 444; Sprigg v. Craig, 51 Ill. 288.

⁸ Hall v. Wright, 96 E. C. L. 746; Boast v. Firth, L. R. 4 C. P. 8.

⁹ Tompkins v. Wadley, 3 T. & C. 424.

¹⁰ Buttman v. McAuley, 5 Abb. Pr. (N. S.) 29; s. c., 1 Abb. Pr. 288. See Palmer v. Andrews, 7 Wend. 142; Willard v. Stone, 7 Cow. 22; Espy v. Jones, 37 Ala. 379; Denslow v. Van Horn, 16 Ia. 476.

¹¹ Walker v. Johnson, 33 N. E. Rep. 267 (Ind., 1893).

¹² Reed v. Reed, 49 O. S. 654.

that he has refused to marry said plaintiff, but on the contrary avers and alleges that on the — day of —, 18—, and at all times since, he has been and is now ready and willing to marry said plaintiff, etc.

Sec. 393. Answer of bad character of plaintiff.—

Defendant says that at the time he made the agreement to marry the plaintiff she was known by her acquaintances generally to be unchaste, of all which defendant was entirely ignorant. That as soon as he learned of her character and reputation he refused to marry her.

NOTE.— Under an answer denying the promise the defendant may show in mitigation of damages that plaintiff was delivered of a bastard child. *White v. Thomas*, 12 O. S. 812.

Sec. 394. Answer claiming misconduct of plaintiff.—

Defendant says that since the date of the promise of marriage set forth in plaintiff's petition, the plaintiff did on the — day of —, 18—, have sexual intercourse with one A. B. That when defendant learned of the fact he refused to marry plaintiff.

Sec. 395. Answer setting up conditions imposed by plaintiff not a part of original promise.—

Defendant for answer to the petition says that he does not deny, but admits that he did promise to marry the plaintiff about the month of —, 18—; that he did not refuse to marry the plaintiff, but was ready and willing and before said action was commenced offered to fulfill said promise and tendered the performance thereof, but the plaintiff unreasonably refused to fulfill said promise on her part; that the plaintiff refused to fulfill and consummate said promise on her part except on terms and conditions which were unreasonable and no part of the original agreement, and which could not fairly be required of or complied with by the defendant; that the defendant provided a suitable house and place of residence and the plaintiff refused to go there to reside [*or other conditions*], and that the plaintiff was otherwise unreasonable in the interposition of claims and demands which were not a part of the original promise, and required that the defendant should comply with them as conditions of her fulfillment of her promise or agreement; and so the defendant says that he was always ready and willing to fulfill the promise made by him but the plaintiff was unwilling to fulfill the promise made by her.

NOTE.— From *Hook v. George*, 108 Mass. 824. This answer really amounts to a denial and does not shift the burden of proof.

CHAPTER 25.

BUILDING AND LOAN ASSOCIATIONS.

Sec. 396. Actions to foreclose building association mortgages — Pleading.

Sec. 397. Petition to foreclose building association mortgage.

Sec. 396. Actions to foreclose building association mortgages — Pleading.— It is necessary, in actions by or against building associations, to allege their corporate character as in the case of other corporations. Nothing further than a statement of the corporate name need be alleged. A contract is not void because the corporation with which it is made is misnamed; and where a corporation sues by a wrong name the pleading may be amended.¹ So where a bond has been executed to a corporation by a name varying from its true one, the corporation may nevertheless sue by its corporate name.² Where, in foreclosing a building and loan association mortgage, a judgment is desired for money paid by it for taxes, the fact of payment of the taxes by the association should be fully set forth, and judgment prayed therefor, although if judgment be rendered without such averment it will not be prejudicial error.³ In an action to foreclose a mortgage to a building association to secure a bond, an averment that “said sum of — dollars with interest thereon remains unpaid” is a sufficient allegation to obtain a judgment;⁴ and where there is a provision in a mortgage to the effect that if default be made in the monthly payments for a space of six months after they become due, a petition to foreclose, which does not allege or show that there has been default in any one monthly payment for that period, is fatally defective.⁵ If a bond and mortgage specifies a certain rate of interest, together with a

¹ *Hoboken Building Ass'n v. Martin*, 2 Beas. (N. J.) 427.

⁴ *Swift v. B. & L. Ass'n*, 82 Pa. St. 142.

² *McMinn v. Reneau*, 2 Swan, 94.

⁵ *Building Ass'n v. Platt*, 5 Duer,

³ *Bates v. People's, etc. Ass'n*, 42 O. S. 655.

monthly instalment on each share, recovery may be had for the amount in arrears without deductions for a monthly instalment.¹ In computing or determining the amount due on a building association mortgage, interest will not be allowed on dues, as members are entitled to dividends and not interest;² and after breach of a condition in the mortgage the decree to foreclose should be limited to the amount of dues, interest and fines then due and unpaid.³ It is held that the rule for ascertaining the proper amount to be recovered in an action to foreclose a building association mortgage is to ascertain by proof the probable duration of the association, then to estimate the aggregate amount of the bi-weekly instalments payable during that time, and from that sum rebate the just amount for interest, and add thereto the arrearages due, after allowing for payments made to the association; the sum thus ascertained would be the amount to which plaintiff would be entitled to recover, with interest until paid.⁴

Sec. 397. Petition to foreclose a building association mortgage.—

1. Plaintiff says it is a corporation duly incorporated under the laws of Ohio, and doing business in the city of —, county of — and state of Ohio.

That defendant C. G., on or about the — day of —, 18—, borrowed from this plaintiff the sum of \$—, and executed his bond therefor to this plaintiff, a copy of which bond is as follows: [*set forth a copy, or say: the conditions of which bond were in substance, etc.*]

That said defendant C. G., from and after the execution and delivery of the aforesaid bond, paid the monthly dues, interest and premiums as therein specified until and including the month of —, 18—, and that since said month of — said defendant has wholly failed to comply with the provisions and conditions in said bond contained. By virtue of the constitution and by-laws of the said association said defendant C. G., on his aforesaid default in the payment of said monthly dues, interest and premiums, has been fined in the sum of — cents for each share so borrowed, for every month in which he was and is in default; and that there is due and unpaid from this defendant C. G. to this plaintiff, on the above-

¹ People's Building & Loan Ass'n v. O. S. 186; Risk v. D. B. & L. S. Ass'n. Furey, 47 N. J. Eq. 410. 31 O. S. 517.

² Allemania, etc. Building Ass'n v. Mueller, 8 W. L. B. 97. ⁴ McCahan v. Columbian Building Ass'n, 40 Md. 226. See 36 Md. 383.

³ Hagerman v. M. & L. Ass'n, 25

recited bond, the sum of \$—, with interest thereon at — from —, and a total monthly premium of \$—, together with — cents fine for each of said — shares per month, for every month default is made in said payments from said — day of —, 18—.

2. [*Usual averments.*] That to secure the payment of the bond aforesaid in all its terms, conditions and covenants, the said C. G. and M. G., his wife, and who released her right of dower in the premises hereinafter described, executed and delivered unto this plaintiff their certain mortgage deed, bearing date —, 18—, and thereby conveyed to the plaintiff in fee simple the following described property, situate, etc. [*description of property.*]

Said mortgage deed was delivered to the recorder of — county, Ohio, for record, according to law, on the — day of —, 18—, at — o'clock — M., and was duly recorded in Mortgage Record, vol. —.

Said mortgage deed had a condition therein written that if [*here state the substance of the conditions as in other foreclosures, or give a copy.*]

That the said C. G. has wholly failed to pay the dues, interest, premium and fines upon said loan of — dollars, according to the conditions contained in said mortgage deed, hereinbefore set forth, since the month of —, by reason whereof this mortgage deed has become absolute.

There is due plaintiff from defendant the sum of \$—, with interest monthly on \$— thereof, at — per cent. from —, and a total monthly premium of \$—, together with — cents fine on each of said — shares per month, for every month default is made in said payments from said — day of —, 18—.

Plaintiff therefore prays that in default of payment of the amount now payable, or that may become payable before judgment herein, said mortgage may be foreclosed, that said premises be sold as upon execution to satisfy this plaintiff's mortgage indebtedness from said defendant, and that out of the proceeds arising from such sale plaintiff's claim be paid, and for other proper relief.

NOTE.—88 O. L., p. 469. A person who has deposited even a small amount of money with an association, when sued for money loaned him is estopped from denying that he is the depositor. *Bates v. People's Ass'n*, 43 O. S. 855.

CHAPTER 26.

COMMON CARRIERS.

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| <p>Sec. 398. Common carrier defined.</p> <p>399. Liability of carrier — Considered generally.</p> <p>400. The bill of lading.</p> <p>401. Delivery by carrier.</p> <p>402. Limiting liability.</p> <p>403. Connecting carriers.</p> <p>404. Actions against carriers relative to carriage of goods — The petition.</p> <p>405. Petition for loss of goods.</p> <p>406. Petition for failure to safely carry goods.</p> <p>407. Petition for failure to deliver within time agreed.</p> <p>408. Petition for failure to deliver within a reasonable time.</p> <p>409. Petition for recovery of overcharge.</p> <p>410. Petition for damages for loss of baggage.</p> <p>411. Petition where notice to keep dry is disregarded.</p> <p>412. Petition for damages for negligent breakage.</p> <p>413. Petition for wrongfully delivering goods shipped "C. O. D."</p> | <p>Sec. 414. Petition for failure to receive and carry goods.</p> <p>415. Petition against railroad company for recovery of illegal freight charges.</p> <p>416. Actions against carriers with respect to carriage of passengers — The petition.</p> <p>417. Petition for failure to receive and carry passenger.</p> <p>418. Petition against railroad company for wrongful ejection of passenger.</p> <p>419. Petition for carrying passenger past station.</p> <p>420. Defenses to actions against common carrier.</p> <p>421. Answer that goods were lost by land - slide — Flood — Act of God.</p> <p>422. Answer that liability was limited by special contract.</p> <p>423. Answer that property was stolen without defendant's fault.</p> <p>424. Answer that goods were improperly packed.</p> |
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Sec. 398. Common carrier defined.— A common carrier is defined as one that undertakes for reward to carry, or cause to be carried, goods for all persons indifferently, from one place to another.¹ An express company, although not the owner of the means of conveyance, is a common carrier.² A

¹ U. S. Express Co. v. Backman, 28 O. S. 144; Story on Bailments, sec. 443; 2 Redf. on Railways, 3, 4.

² Id. An express company is defined by recent statute: "That any person or persons, joint-stock associ-

stage-coach engaged in carrying parcels not belonging to its passengers,¹ and a ferryman occupying a position on a line of public travel, holding himself out for general employment, are also common carriers;² but a person occasionally carrying goods for hire, not holding himself out as such, will not be regarded as a common carrier, and is therefore bound only to ordinary care as a bailee.³

Sec. 399. Liability of carrier — Considered generally.—

The liability of a carrier attaches immediately upon receipt of goods by it, and it is therefore liable for their loss while in its warehouse awaiting transportation.⁴ The common-law rule that the liability of the carrier continues not only until the goods have reached the place of destination, but until the person to whom they are consigned has had notice and a reasonable time to take charge of the same, prevails in Ohio and elsewhere.⁵ But if the consignee fails to call for them within a reasonable time after notice, the liability of the carrier is changed to that of warehouseman.⁶ In obedience to the inflexible maxim of *lex loci contractus*, as applicable to the carriage of goods, the law of the place where the same are to be delivered governs the liability of the carrier.⁷ A common

ation or corporation, engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate or other articles, by express, not including the ordinary lines for transportation of merchandise and property in this state, shall be deemed an express company." 91 O. L. 237.

¹ *Dwight v. Brewster*, 1 Pick. 50. *Contra*, *Sheldon v. Robinson*, 7 N. H. 157.

² *Wilson v. Hamilton*, 4 O. S. 722.

³ *Sams v. Stewart*, 20 O. 69.

⁴ *Railroad Co. v. Barrett*, 36 O. S. 148.

⁵ *Railroad Co. v. Hatch*, 6 O. C. C. 690 (*Hancock Co.*, 1892); *Gaines v. Union Transfer Co.*, 28 O. S. 445; *Hirsch v. Steamboat Quaker City*, 2 Disn. 144; 4 W. L. M. 99; *Swan's*

Treatise, 371; *Railroad Co. v. McMillan*, 16 Mich. 79; *Buckley v. Railroad Co.*, 18 Mich. 121; *Feige v. Railroad Co.*, 62 Mich. 1; *Moses v. Railroad Co.*, 32 N. H. 523; 16 Kan. 333; *Mills v. Railroad Co.*, 45 N. Y. 622; *Hedges v. Railroad Co.*, 49 N. Y. 223; *Sherman v. Railroad Co.*, 64 N. Y. 254; *Redfield on Carriers*, sec. 108; 79 Ala. 395; 38 Vt. 402.

⁶ *Railroad Co. v. Hatch*, *supra*; *Fenner v. Railroad Co.*, 44 N. Y. 505; *Hirsch v. Steamboat Quaker City*, *supra*.

⁷ *Curtiss v. Railroad Co.*, 74 N. Y. 116; *Dyke v. Railroad Co.*, 45 N. Y. 118; s. c., 6 Am. Rep. 43; *Jacobson v. Adams Exp. Co.*, 1 O. C. C. 381 (*Pickaway Co.*, 1885), affirmed by supreme court; *Gault v. Adams Exp. Co.*, 48 Am. Rep. 744.

carrier is not only responsible for negligence, but is an insurer against loss not occasioned by the act of God, the public enemy, or the fault of the party suffering loss.¹ But the undertaking of a carrier as an insurer cannot be extended to merchandise carried by a traveling salesman in order to facilitate his business.² Nor is a common carrier an insurer as to time, being bound only to transport goods within a reasonable time, and if delay is caused by unavoidable accident the loss ensuing is not chargeable to it.³ In such cases a carrier is bound to use good judgment and due diligence. If the property is of a perishable nature and the loss occurs by reason thereof, it cannot be held responsible, and if it becomes impossible to reach its destination before it becomes a total loss, the carrier may sell the same for the best price obtainable.⁴ If, however, a carrier has knowledge that an article is intended for a certain market, and unreasonably delays the transportation thereof, during which delay the market value depreciates, it will be liable for damages caused thereby.⁵ A carrier may refuse to transport goods which are improperly packed, and if injury occurs by reason thereof the owner cannot recover, although he may for injuries occurring independently of defective packing;⁶ and in the absence of knowledge on the part of the carrier of such improper packing, it will not be liable for breakage if it handles the goods in the usual manner.⁷ A carrier by water is responsible in the same manner as are carriers by land,⁸ except that they cannot be held liable for loss of goods which become worthless on account of delay caused by a low stage of water.⁹ If a carrier undertakes to

¹ *Bohannon v. Hammond*, 42 Cal. 227.

⁶ *Schrivver v. Railway Co.*, 24 Minn. 506.

² *Penn. Co. v. Miller*, 85 O. S. 541; *Richards v. Westcott*, 2 Bosw. 589.

⁷ *Rixford v. Smith*, 52 N. H. 355; *Ross v. Railroad Co.*, 49 Vt. 364;

³ *American Exp. Co. v. Smith*, 33 O. S. 511; *Waring v. Railroad Co.*, 8 W. L. B. 893.

Bohannon v. Hammond, 42 Cal. 227; *Miltimore v. Railroad Co.*, 37 Wis. 190; *American Exp. Co. v. Perkins*, 42 Ill. 458.

⁴ *American Exp. Co. v. Smith*, 33 O. S. 511.

⁸ *Steamer Niagara v. Cordes*, 21 How. (U. S.) 7.

⁵ *Devereux v. Buckley*, 31 O. S. 16; *Texas Pac. Ry. Co. v. Nicholson*, 61 Tex. 491; *Penn. Co. v. Clark*, 2 Ind. App. 146; *Cincinnati, etc. Railroad Co. v. Case*, 122 Ind. 310.

⁹ *Starbick v. Railroad Co.*, 1 W. L. B. 110.

transport goods to their destination without change of cars and fails so to do, it cannot avail itself of any restriction upon its common-law liability contained in the contract in the event of loss.¹ A carrier is responsible for all losses arising from its neglect of any duties incident to its employment.²

Sec. 400. The bill of lading.—The bill of lading is the contract between shipper and carrier and is a symbol of the property therein described; the ownership may be transferred by means of such bill, delivery of which is equivalent to delivery of the property; and where the right to control the same is reserved by the shipper the carrier is his agent.³ If the suit be upon contract it must be based upon the bill of lading.⁴ If a parol contract be made before the bill of lading is issued the shipper may prove the parol contract under which the goods were received and shipped.⁵ A carrier is liable for goods lost by reason of its negligence, even though the bill of lading provides that it shall not be liable beyond an amount named therein, when it is understood by the parties that the amount is less than the actual value of the goods.⁶ It is not essential that a bill of lading be signed by the consignor, as it is binding if accepted and acquiesced in by him.⁷ The right of stoppage *in transitu* may be defeated by a *bona fide* sale to a third person made by a transfer of the bill of lading.⁸ It is made the duty of railroad companies by statute to count or check packages comprising each lot or car-load of goods or merchandise presented for shipment, and to furnish the shipper a bill of lading specifying the number of packages shipped in each car, which shall bind the company to deliver the same number of packages at the place of destination named in the bill of lading. Upon refusal to give such bill of lading the company becomes liable to a penalty of fifty

¹ *Stewart v. M. D. T. Co.*, 47 Ia. 229; ⁵ *Guillaume v. Transportation Co.*, 100 N. Y. 491; *Germania Fire Ins. Robinson v. M. D. T. Co.*, 45 Ia. 470.

² *Welsh v. Railway Co.*, 10 O. S. 65; *Co. v. Railroad Co.*, 72 N. Y. 90; s. c. *Davidson v. Graham*, 2 O. S. 189. 28 Am. Rep. 113.

³ *Emery v. Bank*, 25 O. S. 860.

⁶ *U. S. Express Co. v. Bachman*, 28

⁴ *Hall v. Penn. Co.*, 90 Ind. 459; O. S. 144.

Pemberton Co. v. Railroad Co., 104 ⁷ *Railroad Co. v. Pontius*, 19 O. S. Mass. 144; *Railroad Co. v. Bennett*, 221.

⁸ Ind. 457; *Bartlett v. Railroad Co.*,

⁸ *Rosenthal v. Dessau*, 11 Hun, 49.

91 Ind. 281.

dollars, which may be recovered in a civil action against the company.¹

Sec. 401. Delivery by carrier.—A carrier is liable if it delivers goods intrusted to its care to the wrong person;² and where it fails to deliver goods upon demand, the burden of proof is on it to account for the property and to excuse its omission to so deliver.³ If it refuses to deliver goods for reasons other than non-payment of freight, an action will lie against it without previous demand or payment of freight.⁴

Sec. 402. Limiting liability.—It is well-settled law that a carrier cannot make a contract exempting itself from liability for its own negligence or default or that of its agents, and that such a contract cannot be urged by it as a defense; nor can such limitation be made by general notice, known or unknown, to the party engaging the service of the carrier;⁵ nor can it limit its liability for injuries resulting from defective and unsafe cars.⁶ Yet a common carrier may limit its liability in various ways for losses which may happen to goods without its fault or negligence by special contract fairly made by the parties.⁷ Such an agreement relieves the carrier only from the common-law liabilities where it is free from fault, and the burden is upon it to prove that the loss was occasioned without its fault.⁸

That a carrier may limit its common-law liability by a notice or printed receipt, other than a bill of lading, the same must be assented to by the shipper, and the mere receipt of such a paper by the agent of the shipper without objection will not show such an assent.⁹ This rule, however, is not ap-

¹ 91 O. L. 207.

² *McCulloch v. McDonald*, 91 Ind. 240; *Adams v. Blankenstein*, 2 Cal. 418.

³ *Golden v. Romer*, 20 Hun, 488.

⁴ *Wiggin v. Railroad Co.*, 120 Mass. 201.

⁵ *Davidson v. Graham*, 2 O. S. 181; *Graham v. Davis*, 4 O. S. 363; *Gaines v. Transportation Co.*, 28 O. S. 418, 438; *Railroad Co. v. Pontius*, 19 O. S. 285; *Welsh v. Railroad Co.*, 10 O. S. 65; *Liverpool, etc. v. Insurance Co.*, 129 U. S. 397; *Railroad Co. v. Curran*, 19 O. S. 1.

⁶ *Welsh v. Railroad Co.*, 10 O. S. 65.

⁷ *Gaines v. Transportation Co.*, 28 O. S. 418, 438. See, also, *Evansville R. R. Co. v. Young*, 28 Ind. 516; *Indianapolis R. R. Co. v. Allen*, 31 Ind. 394; *Mich. etc. R. R. Co. v. Heaton*, 37 Ind. 448; *Morrison v. Phillips, etc. Co.*, 44 Wis. 405.

⁸ *Union Express Co. v. Graham*, 26 O. S. 595; *U. S. Express Co. v. Backman*, 28 O. S. 144; *Gaines v. Transportation Co.*, 28 O. S. 438.

⁹ *Mack v. Great Western Despatch*, 3 O. C. C. 36 (*Ham. Co.*, 1888).

plied to a bill of lading, as it has been expressly held that a bill signed by the carrier's agents, accepted and acquiesced in by the consignor, is binding upon the latter, though not signed by him;¹ nor will such assent be presumed from facts not clearly showing acquiescence in the conditions of the contract, as the presumption is that he intended to insist upon his common-law rights.² In order to hold such consignor the carrier must specially plead and prove that the bill of lading has been assented to by the shipper.³ A bill of lading signed by the agent of a carrier, and delivered to the assignor contemporaneously with the receipt of goods for shipment, acquiesced in by him, becomes part of the contract of shipment and cannot be contradicted by parol.⁴ A limitation of the liability of a carrier for loss of baggage on a ticket is not binding unless the passenger with full knowledge agrees to it.⁵ A carrier is liable for the value of goods lost by its negligence, even though the contract of shipment specially provides that it shall not be liable beyond a certain amount, as such an agreement can only cover a loss from a cause other than negligence of the carrier.⁶ Where a loss occurs from fire it is incumbent upon the carrier to show its origin, and it must bring itself clearly within an exception as to an unavoidable accident provided for in the contract of shipment.⁷ It is customary and perfectly competent for a shipper and carrier to enter into a contract stipulating what the damages shall be in case goods are lost by reason of negligence of the carrier.⁸ A con-

¹ *Railroad Co. v. Pontius*, 19 O. S. 221; *Robinson v. M. D. T. Co.*, 45 Ia. 470. O. S. 132; *Graham v. Davis*, 4 O. S. 362; *Welsh v. Railroad Co.*, 10 O. S. 65; *Railroad Co. v. Curran*, 19 O. S. 1;

² *Railroad Co. v. Barrett*, 36 O. S. 448. *Union Express Co. v. Graham*, 26 O. S. 595; *Railroad Co. v. Lockwood*, 17 Wall. 357.

³ *Gaines v. Transportation Co.*, 28 O. S. 418; *Railroad Co. v. Blackmore*, 1 O. C. C. 42 (Ham. Co., 1885). See 39 *Miss.* 332; 42 *Mo.* 94; 42 *Ill.* 93; 61 *Ill.* 186. ⁷ *Insurance Co. v. Railroad Co.*, 1 *Disn.* 490.

⁴ *Railway Co. v. La Tourette*, 2 O. C. C. 279. ⁸ *Ballou v. Earle*, 27 *W. L. B.* 83 (R. L., 1891); *Express Co. v. Sands*, 55 *Pa. St.* 140; *Oppenheimer v. Express Co.*, 69 *Ill.* 62; *Kallman v. Express Co.*, 8 *Kan.* 205; *Boehme v. Express Co.*, 25 *Md.* 328; *Snider v. Express Co.*, 63 *Mo.* 376; *Bowman v. Express Co.*, 21 *Wis.* 154.

⁵ *Railroad Co. v. Campbell*, 36 O. S. 647, 648, and cases cited.

⁶ *U. S. Express Co. v. Backman*, 28 *O. S.* 144; *Davidson v. Graham*, 3

tract that a carrier shall not be liable for breakage operates only to relieve it from its liability as an insurer, and will not affect its responsibility for losses occurring by reason of its failure to use ordinary care.¹

Sec. 403. Connecting carriers.—In order that a carrier shall become responsible for loss occurring beyond the line of its own route, there must be a special contract to that effect.² But where several carriers connect and form a continuous line, and contract to carry goods throughout the connecting lines for an agreed price, they become jointly and severally liable for loss occurring on any part of the whole line; and in actions against such connecting carriers no particular word is necessary to describe the relations existing between them.³ And where goods are received, destined for a place beyond the route of a carrier, it is the duty of such carrier, in the absence of contrary instructions or usage, to forward the same by the usual conveyance towards their destination.⁴ A carrier may make a valid contract for the carriage of goods beyond the limits of its own road, and become liable for the acts and negligence of other carriers.⁵ A carrier who undertakes to transport goods over the route of another road must transmit, with their delivery to the next carrier, all instructions received from the consignor, and will be liable for loss by reason of its failure so to do.⁶ Where goods are shipped over the lines of several connecting carriers, an intermediate carrier is liable as a common carrier for the loss of goods after delivery to the next carrier;⁷ but a contract that a carrier will not be liable for loss occasioned by negligence of a connecting carrier cannot lawfully be made, as it is against public policy.⁸ A carrier having baggage for which it collects fare for a continuous trip over connecting lines undertakes to transport

¹ *Mo. Valley R. R. Co. v. Caldwell*, 248; 19 Wend. 534; 23 Vt. 186; 5 Kan. 244. ² *Cush*. 69; *Ort v. Railway Co.*, 36

³ *Pittsburgh R. R. Co. v. Morton*, Minn. 396; *Railway Co. v. Pontius*, 61 Ind. 539; *Snow v. Railway Co.*, 19 O. S. 221.

109 Ind. 432. ⁴ *Railroad Co. v. Washburn*, 23 O. S.

⁵ *Wyman v. Railway Co.*, 4 Mo. 324.

App. 35. They need not be designated "partners." *Id.* ⁷ *Railway Co. v. Lockwood*, 28 O. S. 358.

⁸ *Brown v. Mott*, 22 O. S. 149. ⁹ *Railroad Co. v. Pontius*, 19 O. S.

⁹ *Fatman v. Railroad Co.*, 2 Disn. 221.

the same safely to the end of the route.¹ If baggage be lost or destroyed after reaching a connecting line, the contract of carriage may be treated as entire by the passenger, even though no partnership exists between the roads, and may subject all who are interested in the joint contract. It is often difficult to determine, in cases of loss of baggage, where it actually occurs, and it has therefore been held that the road in whose hands the goods are found injured is liable.²

Sec. 404. Actions against carriers relative to carriage of goods — The petition.— The fact that the defendant is a common carrier, and that it was to receive a reward for carrying and delivering goods, should be alleged,³ and that the goods were delivered to the carrier; it is not sufficient to state that the carrier executed a bill of lading.⁴ But if the action is founded on tort, it is not necessary to allege that any compensation was paid.⁵ The owner of goods suing a common carrier to recover damages for injury occurring to goods through negligence must show that they came into the hands of such carrier in good order.⁶ Where the allegations of the petition are that the goods were negligently lost, instead of averring receipt and non-delivery, the burden of proof is upon the plaintiff. If the grounds for recovery be non-delivery of the goods according to contract, then it is incumbent on the carrier to plead and prove due care.⁷ It is essential that the petition aver delivery of the goods to the carrier, that they were accepted, and that the carrier undertook to carry them.⁸ In order that a consignor may maintain an action against a carrier he must allege that he is the owner of the goods, or that they were not elsewhere delivered to and accepted by the consignee than at the place named in the

¹ *Railroad Co. v. Campbell*, 86 O. S. 647.

² *Check v. Railroad Co.*, 2 Dian. 237 (1858); *Erie R. R. Co. v. Lockwood*, 28 O. S. 858.

³ *Bristol v. Railway Co.*, 9 Barb. 158; *McCauley v. Davidson*, 10 Minn. 418; *Penn. Co. v. Clark*, 2 Ind. App. 146.

⁴ *Smith v. Railroad Co.*, 43 Barb. 225; *Jordon v. Hazard*, 10 Ala. 231;

Ball v. N. J. etc. Co., 1 Daly, 491; *Page, etc. v. Railroad Co.*, 4 W. L. M. 644.

⁵ *Wiggin v. Railroad Co.*, 120 Mass. 201; *Hall v. Cheney*, 36 N. H. 26.

⁶ *Smith v. Railway Co.*, 43 Barb. 225.

⁷ *Childs v. Railroad Co.*, 1 C. S. C. R. 480.

⁸ *Jordon v. Hazard*, 10 Ala. 221; *Summerville v. Merrill*, 1 Port. 107.

contract, as the presumption is that title vests in the consignee upon shipment.¹ A petition alleging that goods were delivered to and accepted by another to be carried from one place to another without reward, that the same were lost by the bailee through gross negligence, stating the value and damage to the bailor, states a good cause of action.² In an action against an express company for the loss of a draft, the petition should state the date, the amount, when and to whom payable.³ Where suit is brought upon a contract of carriage containing a special stipulation restricting the liability of the carrier, it is essential that the same be specifically set forth in the petition, in accordance with the rules of pleading. The contract should be set out truly, either in terms or by its legal import.⁴ An action may be maintained by a shipper against a carrier which has transported goods under a contract to collect the purchase price thereof, where it has permitted the consignee to open and examine the same, and who thereupon refused to accept and pay for them, and the goods have been returned to the consignor.⁵ The letters "C. O. D." have a fixed meaning of which the courts will take notice;⁶ and if goods delivered by a vendor to a carrier to be transmitted to the vendee "C. O. D." are destroyed while being so transported, an action for damages caused thereby may be maintained against the carrier by the former only, as title thereto remains in the vendor until they are received and paid for by the vendee.⁷

It is within the power of the legislature to prevent overcharging for transportation of passengers or property.⁸ In an action against a carrier for an overcharge of rate of fare in contravention of statute, it need not be averred that the

¹ *Madisonville Ry. Co. v. Whitesel*, 11 Ind. 55; *Penn. Co. v. Holderman*, 69 Ind. 18. *Lyon v. Hill*, 46 N. H. 49; *Herrick v. Gallagher*, 60 Barb. 566.

² *McCaughey v. Davidson*, 10 Minn. Ind. 263. ³ *U. S. Express Co. v. Keefer*, 59

418. ⁴ *Adams Express Co. v. McDonough*,

⁵ *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 179. ⁶ *O. C. C.* 589 (*Ham. Co.*, 1892); 28 *Fed. Rep.* 184; *U. S. Exp. Co. v. Keefer*, 59 Ind. 263-268; *Wagner v. Hallock*, 3 Colo. 184; *American M. etc. Exp. Co. v. Schier*, 53 Ill. 140;

⁷ *Davidson v. Graham*, 2 O. S. 182; *Clark v. Railway Co.*, 64 Mo. 440. See sec. 482. *Benjamin on Sales*, sec. 382.

⁸ *Aaron v. Adams Express Co.*, 27 W. L. B. 183 (*Ham. Co. C. P.*); ⁹ 71 O. L. 146; *R. S.*, secs. 3333-3373; *Hutchinson on Carriers*, sec. 392;

purchaser of the ticket was in fact carried on the same, or that excessive fare was paid in due course of business.¹ Where a shipper has been injured in his business by reason of discrimination made by a carrier in favor of other shippers, the injured shipper may maintain an action against the carrier, and recover such damages as he may have sustained, including not only the amount of freight illegally exacted, but punitive or exemplary damages.² A parol contract by a railroad to receive cattle on its cars for transportation on a certain day, which has been violated by not furnishing cars, may be made the basis for recovery of all damages caused thereby.³ A cause of action for goods destroyed by fire while in the hands of a carrier need not be joined with another cause of action existing at the same time for goods destroyed by fire while in the hands of such carrier as a warehouseman, and a judgment upon one cause will not be a bar to a subsequent action on the other.⁴

Sec. 405. Petition for loss of goods.—

[*Caption.*]

Defendant is a corporation duly organized under the laws of the state of —, etc. That on the — day of —, 18—, the defendant then being a common carrier of goods for hire from M., in the state of Ohio, unto C., in the state of W. Va., plaintiff delivered to defendant as such carrier, and defendant then received from plaintiff, divers goods, to wit [*describe goods*], of the value of \$—, of the plaintiff, which the defendant agreed for a reasonable reward paid by plaintiff to carry from M., Ohio, to C., W. Va., aforesaid, and at C., W. Va., to be delivered by the defendant for plaintiff for reward to R., K. & Co. The defendant neglected its duty, and did not safely carry said goods from M., Ohio, to C., W. Va., or at C., W. Va., deliver the same for plaintiff; but, by default of the defendant in the premises, the goods were and are wholly lost to the plaintiff, to the damage of the plaintiff in the sum of \$—, with interest thereon from the — day of —, 18—, which he claims, and for which he asks judgment.

NOTE.—From *B. & O. R. R. Co. v. Crawford*, Supreme Court, unreported, No. 2386.

Rule of damages is the value of goods at their destination, with interest. *McGregor v. Kilgore*, 6 O. 358; *Railway Co. v. Lockwood*, 28 O. S. 869; *Sturges v. Bissell*, 46 N. Y. 462; *Spring v. Allen*, 4 Allen, 112; *Laurent v. Vaughan*, 30 Vt. 90.

¹ *Railroad Co. v. Cook*, 37 O. S. 265.

² *Tex. Pac. Ry. Co. v. Nicholson*, 61

³ *Railway Co. v. Scofield*, 2 O. C. C.

Tex. 491.

305 (*Cuyahoga Co.*, 1887). See *Scofield v. Railway Co.*, 43 O. S. 571.

⁴ *Kronshage v. Railway Co.*, 45 Wis. 500.

Sec. 406. Petition for failure to safely carry goods.—

[Caption.]

[Formal averments as in sec. 405.]

On the — day of —, 18—, plaintiff delivered to the defendant, a common carrier, the following described goods of the value of — dollars, to wit: [*describe goods*]. Said defendant, in consideration of the sum of — dollars paid by plaintiff to said defendant, agreed to safely and securely convey said goods from said — to said —, and there to safely deliver to one C. D.

That defendant did not safely convey and deliver said goods as it had undertaken to do, but on the contrary conducted itself so carelessly in and about carrying and transporting the same that at —, on the line of the defendant's railroad, between said — and —, one of the cars containing said goods was thrown from the track and overturned and said goods were thereby wholly destroyed, to the damage of the plaintiff in the sum of — dollars, for which he asks judgment with interest from —.

[Or, Yet the said defendant neglected its duty and did not take care of said goods, nor safely carry and deliver the same as aforesaid, but wholly failed and neglected to carry and deliver the same, whereby said goods were and are wholly lost to the plaintiff, to his damage in the sum of \$—.]

Sec. 407. Petition for failure to deliver goods within time agreed.—

[Caption.]

[Formal averments as in sec. 405.]

On the — day of —, 18—, at S., the plaintiffs delivered to the defendants, who were then and there common carriers, a large number of — [*describe property*], the property of the plaintiff, which the defendants, in consideration of a reasonable and valuable reward paid them by the plaintiff, agreed to safely carry to the city of N., and there deliver to the plaintiff on or before the — day of —, 18—; but the defendants failed to carry out and perform their said agreement in this behalf, and did so negligently and carelessly transport said [*property*], and so negligently manage their trains, that they failed to deliver said [*property*] in said N. until the — day of —, 18—. Plaintiff says the market value of said [*property*] in said N. was greatly diminished between said — day of —, 18—, and said — day of —, 18—, to the great damage and injury of the plaintiff.

NOTE.—The carrier must pay damages occasioned by delay unless there is no negligence on its part. 24 Minn. 506; 31 Am. Rep. 353. If a common carrier has knowledge that an article is intended for a particular market, it is liable for losses caused by an unreasonable delay in its delivery. *Devereaux v. Buckley*, 34 O. S. 16, citing *Cutting v. Railroad Co.*, 18 Allen, 881; *Ward v. Railroad Co.*, 49 N. Y. 29; *Scott v. Steamship Co.*, 106 Mass. 643; *Griffin v. Colvin*, 16 N. Y. 489. A contract by a connecting carrier

cludes it from claiming under the contract made by the first carrier. *Browning v. Transp. Co.*, 47 N. W. Rep. 428.

Damages.—The measure of damages for failure to deliver within time agreed upon is the market value of the articles at the place of delivery at the time they should have been delivered. *Louis v. Steamboat Buckeye*, 1 Handy, 150. See, also, 1 C. S. C. R. 300; 6 O. 359; 47 N. Y. 29; 106 Mass. 648.

Sec. 408. Petition for failure to deliver within a reasonable time.—

[*Caption.*]

[*Formal averments as in sec. 405.*]

On the — day of —, 18—, plaintiff delivered to said defendant as such common carrier the following described property, of the value of — dollars, to wit [*describe property*]; which said goods said defendant then and there received, and in consideration of the sum of — dollars by this plaintiff paid, said defendant agreed to safely and securely convey upon its said line of road from — to — within a reasonable time. That although a reasonable time for the delivery of said goods has elapsed, the defendant did not take care of or safely carry said goods and chattels, and safely deliver the same to said —, but has wholly failed there or elsewhere to deliver the same, whereby they are wholly lost to the plaintiff, to his damage in the sum of \$—.

NOTE.—A carrier is not an insurer as to time, but is bound to transport goods only within a reasonable time, and is not liable for delay caused from inevitable accident. *American Express Co. v. Smith*, 83 O. S. 511; *Ward v. Railroad Co.*, 47 N. Y. 29; *Scott v. Steamship Co.*, 106 Mass. 648. If there be delay in transporting perishable goods, the carrier is excused if it makes reasonable efforts to forward the same. *Id.*

Another form:

The plaintiff claims judgment against the defendant for the sum of — dollars, the price and value of the contents of one box of goods, shipped by the plaintiff upon and over the railroad of the defendant from D., Ohio, to S., Ohio; which said box of goods and contents were received by the said defendant as common carriers, and the said defendant agreed with and promised the plaintiff to deliver said box and contents to the plaintiff, in good order, at S., Ohio, within a reasonable time from the receipt of said goods at D., Ohio, on or about the — day of —, 18—.

The articles contained in said box were as follows: [*Description.*]

[*Prayer, etc.*]

NOTE.—From *Randall v. B. & O. R. R. Co.*, Supreme Court, unreported.

Sec. 409. Petition for recovery of overcharge under special agreement.—

[*Caption.*]

[*Formal averments.*]

That the defendant on the — day of —, 18—, entered into a contract with this plaintiff to carry the following property, to wit: [*describe property*], from C. to D., and deliver

the same to — —, the person to whom it was consigned, at said D., for the carriage of which property said plaintiff was to pay said defendant the sum of \$—, and no more.

That the defendant company accepted said goods in accordance with the terms of said contract of carriage and transported the same from — to —, but refused to deliver the same to plaintiff until plaintiff would pay for the transportation thereof the sum of \$— more than the sum agreed to be paid for the carriage thereof.

Plaintiff thereupon tendered defendant the sum of \$— according to said contract, and demanded the delivery of said goods to him, which sum the defendant refused to receive, and plaintiff was compelled and did pay to defendant the said sum of \$—, under protest, in order to secure the delivery of said property to him.

Plaintiff has therefore, by reason of the violation of said contract by defendant, sustained damages in the sum of \$—, for which he asks judgment.

Sec. 410. Petition for damages for loss of baggage.—

[*Caption and formal averments as in sec. 405.*]

That at the time hereinafter mentioned the defendant was and now is a common carrier for hire of passengers and baggage by railroad between — and —.

That on the — day of —, 18—, the plaintiff purchased a ticket of the defendant company, which entitled him to be carried as a passenger on said railroad from — to —, and which also entitled him to transportation on defendant's line of railway for his baggage. That plaintiff did thereupon on said date become a passenger on said defendant's railway train and delivered to said defendant his trunk, of the value of \$—, and containing chattels of the value of \$—, to be conveyed by defendant as baggage, which the defendant company accepted to be by it so carried.

That defendant did so negligently and carelessly convey and transport said baggage that by reason of said negligence of said defendant the same was wholly lost, to plaintiff's damage in the sum of \$—.

NOTE.— Upon a through ticket the carrier is liable for loss of baggage at any part of the transit, and any negligent carrier is also liable. *Railroad Co. v. Roach*, 27 Am. Rep. 778; 18 Kan. 592. Baggage does not include articles of merchandise intended for sale or for use as samples. *Insurance Co. v. Railway Co.*, 14 W. L. B. 253. Owner of baggage is competent witness to prove contents. *Railroad Co. v. Fulton*, 20 O. 318.

Sec. 411. Petition where notice to keep dry is disregarded.—

[*Caption.*]

[*Formal averments as in ante, sec. 405.*]

On said day the plaintiff, at the defendant's request, delivered to said defendant as such common carrier the follow-

ing goods, then in good order and condition, viz.: [*describe them*], the property of the plaintiff, of the value of \$—, to be by said defendant safely and securely carried to —, for a consideration to be paid to said defendant.

That the plaintiff, at the time of the delivery of the said goods as aforesaid, notified said defendant that in order to preserve said goods it was necessary to keep them dry; but the defendant, disregarding his duty in that regard, negligently permitted said goods to become wet and destroyed [*if not destroyed state the injury*], which loss was occasioned wholly by the negligence of the defendant, by reason whereof the plaintiff has sustained damages in the sum of \$—, etc.

NOTE.—See *ante*, sec. 399.

Sec. 412. Petition for damages for negligent breakage.—

[*Caption and formal averments.*]

That while said defendant was so engaged as such common carrier plaintiff delivered to said defendant at the city of N., and the said defendant then accepted of and for said plaintiff, “one case of plate-glass” of the value of \$—, to be safely carried and conveyed on “flat-cars” to D., Ohio, and there to be delivered to said plaintiff, for a reasonable and valuable reward; that said “case of plate-glass” was shipped at “owner’s risk,” but by the terms of the contract under which the same was received by the defendant, said plate-glass was to be loaded and conveyed to D., Ohio, on a “flat-car.” Said defendant wholly failed and neglected to carry out its said contract of shipment, and did not convey said case of plate-glass on a “flat-car,” but on the contrary, and without the knowledge or consent of this plaintiff, did negligently and carelessly place said case of plate-glass in a “box-car” and did negligently convey the same in a “box-car” from N. to D., Ohio, and did thereby so carelessly and negligently conduct itself in regard to the same in its said calling as a common carrier, that by reason of the carelessness, negligence and fault of the said defendant as such common carrier the said case of plate-glass, while being so negligently shipped and transported by said defendant in said box-car, and while in the care, charge and control of the said defendant as such common carrier as aforesaid, was broken, by reason whereof the said plaintiff has sustained damages in the sum of \$—.

[*Prayer.*]

NOTE.—See *C. C. C. & I. Ry. v. Welch*, 23 W. L. B. 62. The carrier to relieve itself from liability must ship goods as it has agreed. Greater care must be exercised in transporting plate-glass than goods less liable to breakage. *Id.* See *Despatch Line v. Glenn*, 41 O. S. 166.

Sec. 413. Petition for wrongfully delivering goods shipped C. O. D.—

[*Caption and formal averment as in ante, sec. 405.*]

That on the — day of —, 18—, plaintiff delivered to defendant company the following goods, to wit: [*describe them*], the property of the plaintiff, and of the value of \$—, which said goods the plaintiff had sold to one A. B., at —, to be paid for on delivery thereof, and if not so paid, to be returned to the plaintiff. The defendant as such common carrier did on said date, for a reasonable consideration to be paid, undertake to carry and deliver said goods to said A. B. upon condition that said A. B. would pay to said defendant company upon delivery to him the sum of \$—, otherwise the same were not to be delivered to said A. B., which said sum the defendant agreed to pay over to the plaintiff. Defendant, wholly disregarding its duty in this behalf, delivered said goods to said A. B. without collecting and receiving the price thereof, to wit, the sum of \$—, and has wholly failed and neglected to pay the same to plaintiff.

The plaintiff has not received payment for said goods, to his damage in the sum of \$—.

NOTE.—See *ante*, sec. 404, p. 373, note 7.

Sec. 414. Petition for failure to receive and carry goods.

[*Caption.*]

[*Formal averments as in ante, sec. 405.*]

On the — day of —, 18—, plaintiff tendered to the defendant company the following goods, to wit: [*Description.*] Said goods were properly packed and in good condition for shipment, so that defendant could safely carry the same, and plaintiff then and there requested said defendant company to receive said goods and transport the same from — to —, a city on the line of said defendant's railroad, and tendered said company and offered to pay it the sum of \$—, its regular charges for carrying such goods the distance which said plaintiff desired to have said goods carried; but that said defendant company wholly failed and refused to receive said goods or to transport the same to the place desired by plaintiff, although said goods were in proper condition for transportation, and said defendant company had ample cars and equipments to transport and carry the same. That by reason of the conduct of said defendant company in so failing to receive and transport said goods plaintiff has sustained damages in the sum of \$—, for which he asks judgment.

Sec. 415. Petition against railroad company for recovery of illegal freight charges.—

The said plaintiffs say that said — company, defendant, is an incorporated company, duly organized under the

laws of said state. And said plaintiffs aver that said defendant is the owner of a certain railroad located in said county, known as the "Iron Railroad," which said road is over twelve miles in length and is not a road in course of construction, and the gross earnings of which are less than \$— per mile per annum; that on the — day of —, 18—, said plaintiffs, in good faith and in due course of their business, caused to be transported upon and over said "Iron Railroad," while so owned and operated by defendant as aforesaid, from C. station, in said — county, to said city of I., a distance of — miles and no more, — pounds of pig iron, for which transportation said defendant was entitled to demand and receive from said plaintiff the sum of \$— and no more, said sum being the amount due said defendant at the rate of — cents per ton per mile; yet said defendant, its officers and agents, in violation of law, demanded and received of plaintiff for said transportation the sum of \$—, being \$— in excess of the amount authorized by law for said transportation, as aforesaid, by said defendants. By reason of the premises, plaintiff is entitled to recover from defendant the sum of \$—. The said plaintiff therefore, by virtue of and under the provisions of the law, asks judgment against said defendant for said sum of \$—.

NOTE.— From *Iron R. Co. v. Kelley*, error to circuit court of Lawrence county, S. C., No. 1285. See R. S., secs. 3373, 3376; *Railway Co. v. Furnace Co.*, 49 O. S. 102. Interest on a penalty for overcharges cannot be charged. *Id.* See *Brundred v. Rice*, 49 O. S. 640. Whether or not a freight rate is reasonable is a question of fact to be determined in each case.

Sec. 416. Actions against carriers with respect to carriage of passengers — The petition.— A common carrier must carry all proper persons who offer themselves for passage.¹ A ticket is regarded as a mere receipt or voucher, showing that the person holding it has paid his fare and is entitled to ride thereon.² A person who obtains a ticket by fraud cannot give title thereto by sale to another.³ A carrier may expel a passenger for refusing to pay his fare at any place other than a depot, and will not be liable provided care is taken not to expose him to serious injury or danger.⁴ And so it may remove a passenger who is riding upon a ticket, the limitation of which

¹ *Barney v. Steamboat Co.*, 67 N. Y. 647; *Lawson on Carriers*, sec. 106; 301; *Lake Erie, etc. Ry. Co. v. Acres*, *Frank v. Ingalls*, 41 O. S. 560; *Railroad Co. v. Campbell*, 36 O. S. 658.
² *Frank v. Ingalls*, 41 O. S. 560.
³ *Frank v. Ingalls*, 41 O. S. 560.
⁴ *Railroad Co. v. Skillman*, 39 O. S.

² *Railroad Co. v. Bartram*, 11 O. S. 444.
 457; *Railroad Co. Campbell*, 36 O. S.

has expired, even though such passenger has been prevented from reaching the end of his journey before the expiration of his ticket by reason of delay in trains. The fact that a ticket has been wrongfully taken up will not relieve a passenger from the duty of providing himself with another, and if removed for failing so to do, his action must be for the wrongful taking up of the ticket and not for the expulsion.² A passenger who voluntarily leaves a train after having given up his ticket and stops over at a certain station, and again resumes his journey on the same ticket, may also be expelled upon refusal to pay his fare.³ In the absence of an express agreement to the contrary, a carrier is liable to a passenger whom it undertakes to carry, with or without compensation, for any injury caused by culpable negligence or want of skill on the part of its agents.⁴ A passenger traveling in a sleeping-car may, in the absence of notice to the contrary, assume that the whole train is under one management, and may maintain an action against the railroad company for injury received through the negligence of an employee of the sleeping-car.⁵ If a passenger has been carried beyond the place of destination, he may maintain an action against the carrier for any injury caused thereby,⁶ although the duty is incumbent upon a passenger to ascertain for himself whether or not the train upon which he embarks will put him off at the place where he desires to stop.⁷ The remedy or right of action given to a passenger who has been wrongfully carried past the station of his destination is upon an implied contract, and not *ex delicto*.⁸ In such action the plaintiff must aver that the train on which he took passage was one which by the regulations of the company should have stopped at the station where

¹ Penn. Co. v. Hine, 41 O. S. 276.

102 U. S. 451; Thorpe v. Railway

² Shelton v. Railway Co., 29 O. S. 214. See chapter on Assault and Battery, sec. 230.

Co., 76 N. Y. 402; Kinsley v. Railroad Co., 125 Mass. 54.

³ Hatten v. Railroad Co., 39 O. S. 875; Railroad Co. v. Bartram, 11 O. S. 457.

⁴ Whitewater R. R. Co. v. Butler, 112 Ind. 598; Terre Haute R. R. Co. v. Buck, 96 Ind. 346.

⁴ Nolton v. West R. R. Corp., 15 N. Y. 444.

⁷ Johnson v. Railroad Co., 46 N. H. 213; Pittsburgh, etc. Ry. Co. v. Nuzzen, 50 Ind. 141.

⁵ Railroad Co. v. Walrath, 38 O. S. 461 (1882). See Penn. Co. v. Roy,

⁸ Evansville, etc. R. R. Co. v. Kyte, 32 N. E. Rep. 1134 (Ind., 1893).

the passenger desired to stop, or that by special contract the company had agreed to carry him to that station upon that train.¹ An allegation that the plaintiff was ready, willing and offered to pay such sum as the carrier was legally entitled to charge is sufficient in an action for a breach by the carrier in not conveying a passenger.²

Sec. 417. Petition for failure to receive and carry passenger.—

[*Caption.*]

[*Formal averments as in sec. 405.*]

Plaintiff alleges that on the — day of —, 18—, he applied to the agents of the defendant company at its depot at — for a passage on train number —, which said train, according to the schedules of said defendant company, was announced to stop at said station; that plaintiff was in a proper condition to be received and carried as a passenger on said train of the defendant company, and it had sufficient means and facilities for carrying him, but said defendant unlawfully and wrongfully refused to receive and carry plaintiff on said train as a passenger to said station —, by reason whereof plaintiff was damaged in the sum of \$—.

Sec. 418. Petition against railroad company for wrongful ejection of passenger.—

Defendant is a corporation duly organized under and by virtue of the laws of the state of Ohio, for the purpose of constructing, operating and running a railroad from the city of B., in the state of New York, to the city of C., in the state of Illinois, and that before and at the time of committing the wrongs and injuries hereinafter stated, owned, controlled and used said railroad running from and between said cities of B. and C., with its locomotives and cars, as a common carrier of freight and passengers over and upon said line of railroad; and that said M. M. T., plaintiff, on the night of the — day of —, 18—, at about the hour of — o'clock, at S., in the state of Ohio, one of the stations on said road, bought a ticket from the agent of said defendant authorizing her, as a passenger, to pass over said road, in the cars of the defendant, from said S. station to the city of C., in said state of Ohio, and that, as such passenger, said plaintiff then and there entered the cars of said defendant, which were then standing upon said railroad and about to depart for said city of C., and was about to take her seat therein for the purpose of being

¹O. & M. Ry. Co. v. Hatton, 60 Ind. 12. ²Tarbell v. Railway Co., 84 Cal. 616.

conveyed to said city of C.; yet the said defendant, by its agents and servants, disregarding its duty as such common carrier of passengers, did before said cars of said defendant had reached the end of said journey, to wit, at the said S. station, wrongfully, forcibly, maliciously and unlawfully force, expel and drag the said plaintiff from the cars of said defendant, and refused the said plaintiff permission to ride in said cars of said defendant, and left said plaintiff there in the night time, where she was an entire stranger, with the temperature at about zero, without having completed her said journey; at which place she was compelled to remain until the next morning at eight o'clock, before she could continue her journey, whereby she was greatly delayed in her business, and other wrongs then and there wrongfully, forcibly, maliciously and unlawfully did to said plaintiff, to the damage of said plaintiff — dollars.

Wherefore the plaintiff prays judgment against said defendant for the sum of — dollars, as damages sustained.

NOTE.—From *L. S. & M. S. Ry. Co. v. Tuttle*, Supreme Court, unreported, No. 1187.

Damages.—Injury to feelings, indignity, mental suffering and wounded pride may be considered in estimating damages where no personal injury is inflicted. *Gormon v. Southern Pac. Co.*, 81 Pac. Rep. 1112. Rate of fare, see R. S., sec. 8874. This action is of a different nature from one for an assault. See *ante*, secs. 280–32. Compensatory damages only can be allowed where the passenger ejected became a passenger expecting to be ejected, to enable him to bring suit against the company. *Railroad Co. v. Cole*, 29 O. S. 126.

Sec. 419. Petition for carrying passenger past station.—

[*Caption.*]

[*Formal averments.*]

On said day plaintiff purchased from the defendant a ticket at —, entitling him to passage on said road from — to —, a station on said railroad, and took passage on defendant's car for said station.

That said station at — was, by the rules and regulations of the defendant, a regular stopping place for its trains, and the train on which the plaintiff took passage was accustomed to stop thereat.

[*Or*, In consideration of plaintiff's buying said ticket, defendant at the time promised and agreed to stop its train and put him off at said — station.]

Defendant wholly neglected, failed and refused to stop at said — station, and did not let plaintiff off said train until its arrival at —, a station — miles beyond. That by reason of said defendant's conduct in this behalf plaintiff was put to an expense of — dollars to return to said — station, and sustained damages in the sum of — dollars.

NOTE.—R. S., sec. 8820. As to negligence in carrying beyond platform, see *Railway Co. v. Doane*, 115 Ind. 435; 17 N. E. Rep. 918. A passenger must inform himself of rules as to time-tables and stoppage of trains.

Sec. 420. Defenses to actions against common carriers.—

A carrier cannot be held liable for a delay caused by an inevitable accident over which it had no control.¹ A defense that loss of baggage was caused by spontaneous combustion of an article in the baggage of another passenger cannot be made upon the theory that it was the act of God.² It seems to be generally conceded that where a carrier desires to interpose an act of God as a defense to an action for loss of goods, such as an extraordinary flood, it may do so under a general denial.³ When intervening such a defense the burden is upon the plaintiff to show that loss was caused by the negligence of the carrier.⁴ But when goods are found injured in charge of a carrier the burden is upon it to show that the same occurred from a cause such as will constitute a legal defense.⁵ Though an action sounds in tort the carrier may set up in its answer a special contract of shipment, if it be one which the law permits it to make;⁶ but where a carrier sets up a contract of shipment different from that claimed by plaintiff, it is incumbent on it to prove that the same had been performed on its part, and sanctioned and assented to by plaintiff, in order that it may be available as a valid defense.⁷ Nor can a carrier by a special contract of shipment defeat an action in tort for non-delivery, based upon the common-law obligation to use due diligence in transportation.⁸ A judgment against one of two carriers for breach of a joint contract for the carriage of goods is a bar to a subsequent action against both carriers upon the same contract.⁹ And so a judgment in favor of a carrier, in an action for the recovery of freight, is a bar to an action by the owner of the goods for the recovery of damages for their destruction, caused by failure on the part of the carrier to perform its contract of transportation.¹⁰ Un-

¹ *L. S. & M. S. Ry. Co. v. Bennett*, 89 Ind. 457; *Hill v. Penn. Co.*, 90 Ind. 459.

² *Keith v. Railroad Co.*, 1 W. L. M. 451.

³ *Ellett v. Railroad Co.*, 76 Mo. 518; *Davis v. Railway Co.*, 16 W. L. B. 427 (Mo., 1886). See *Hutchinson on Carriers*, secs. 766, 767; *Lawson on Carriers*, sec. 248.

⁴ *Id.*

⁵ *Hall v. Cheney*, 36 N. H. 26.

⁶ *Oxley v. Railway Co.*, 65 Mo. 620-

632.

⁷ *Railroad Co. v. Blackmore*, 1 O. C. C. 42 (Ham. Co., 1885).

⁸ *Clark v. Railway Co.*, 64 Mo. 440.

⁹ *Reynolds v. Railroad Co.*, 29 O. S. 602.

¹⁰ *Dunham v. Bower*, 77 N. Y. 76.

less a carrier actually receives goods into its possession, there is no liability imposed upon it, even to an innocent consignee or indorsee for value; and the carrier may show that the goods were not in fact received.¹ Where a shipper intrusts goods to a carrier, requiring a particular degree of care in their transportation, but does not give the actual contents or precise nature of the same, the carrier may, in an action for their loss, set up a defense that it did not receive or agree to transport the particular kind of goods. And it may be shown under a general denial that it did not enter into a contract to receive the particular kind of goods because of the deception of the shipper.² A carrier of passengers in Ohio is required by statute to cause a certain number of regular trains for passengers to stop daily, at stations where there are three thousand inhabitants, a sufficient length of time to receive and let off passengers, and prescribes a penalty for failing so to do.³ Hence it follows that in an action by a passenger who has been ejected because he holds a ticket for a station at which the train does not stop, in view of the statute a defense cannot be urged that by the regulations of the carrier the train does not stop at the station for which the ticket calls, if there be a population of three thousand inhabitants at such place.⁴

Sec. 421. Answer that goods were lost by land-slide — Flood — Act of God.—

[Special contract of shipment may first be set up, as in sec. 422, post.]

Defendant says that while said merchandise was being transported, pursuant to the above special contract, and without any carelessness or misconduct of the defendant or its servants, or any defect of the car in which said goods were being transported, the train of cars of which the car in which plaintiff's goods were being transported formed a part was stopped without fault of defendant or its servants in the narrows between B., W. Va., and M., W. Va., by a "land-slide," and detained for the space of — hours, and when said track was cleared so that said train of cars could and did proceed to M., W. Va., where, without any fault of defendant or its serv-

¹ Bank v. Railroad Co., 24 W. L. B. 335 (Minn., 1890).

² Despatch Line v. Glenny, 41 O. S. 166. See Angell on Carriers, sec. 265 (5th ed.).

³ R. S., sec. 3320.

⁴ Penn. Co. v. Wentz, 87 O. S. 338. Such regulations are subject to legislative control. Commonwealth v. Railroad Co., 105 Mass. 254; Shields v. State, 26 O. S. 86; s. c., 95 U. S. 319.

ants, said train of cars, of which the car in which plaintiff's goods were being transported formed a part, was caught in an unusual flood of water, and said goods were so badly damaged as to render them worthless by unavoidable accident by said unusual flood, and not by any default, negligence or misconduct of the defendant. Whereupon defendant, having fully answered, asks to be dismissed.

Sec. 422. Answer that liability was limited by special contract.—

[*Caption.*]

Defendant admits that the goods described in the petition were shipped on its cars, and were damaged, as alleged, but says that the same were shipped under special contract, which provided in substance: [*here plead substance.*]

That the defendant fully complied on his part with the conditions of said contract to be performed, and said injury and damage resulted without the fault or negligence of defendant.

That the plaintiff did not comply with the conditions of said contract in this: [*state wherein carrier failed.*]

That by reason of the plaintiff's failure to comply with said contract and of his acts above stated said injury resulted.

[*Or, That while defendant was transporting said goods under said contract, using ordinary care and all proper diligence, the same were, without any fault or negligence on defendant's part, destroyed by (state how destroyed.)*]

NOTE.—A carrier may by special agreement limit its liability, but not by a general notice unknown to the party engaging the service of the carrier. *Gaines v. Trans. Co.*, 28 O. S. 487; *Davidson v. Graham*, 2 O. S. 181; *Graham v. Davis*, 4 O. S. 862; *Welsh v. Railroad Co.*, 10 O. S. 65; *Railroad Co. v. Pontius*, 19 O. S. 221. The burden is on the carrier to prove the special contract, and that the loss falls within the terms thereof. *Graham v. Davis*, *supra*; *Union Exp. Co. v. Graham*, 26 O. S. 595; *United States Exp. Co. v. Bachman*, 28 O. S. 144. In the absence of fraud, evidence cannot be admitted to show that the consignor did not know the contents of a bill of lading. *Grace v. Adams*, 100 Mass. 505; *Kirkland v. Dinsmore*, 16 N. Y. 171.

Sec. 423. Answer that property was stolen without defendant's fault.—

Defendant admits that the goods described in the petition were directed and shipped as therein stated, but says that it safely carried said goods to said city of —, and to the address of said R. F. at said city, as marked on said packages and contained in the bill of lading.

That defendant thereupon made diligent search for said R. F., but found that he did not reside or do business at said city, and was not there.

That defendant made inquiry of various persons in said city as to the whereabouts of said R. F., and found that he formerly resided at the place to which said goods were addressed, but could not, after diligent and careful search in said neigh-

borhood and throughout said city, learn where he resided, or had gone, or his present residence.

That defendant immediately notified the plaintiff, who shipped said goods, that said R. F. could not be found, and placed said goods [*state the place and showing it to be a safe place for storing or keeping the kind of goods lost*], and kept and cared for the same in a proper and careful manner, but on the — day of —, 18—, without the fault or negligence of the defendant, said — [*the place where the goods were stored*] was broken into by some unknown persons, and said goods were, without the fault or negligence of defendant, stolen therefrom, and have not been recovered.

Sec. 424. Answer that goods were improperly packed.—

Defendant says that the goods mentioned in plaintiff's petition were of such a nature as to be easily broken, from a very slight cause, and great care should have been exercised by said plaintiff in preparing the same for shipment, all of which said plaintiff well knew, but that this defendant could not reasonably be expected to know the nature thereof.

That said goods were delivered by plaintiff to this defendant packed in an improper and careless manner [*here state particulars*], when they should have been packed [*here state how they should have been packed*], and that by reason of said defective packing, and without any fault or negligence on the part of this defendant, said goods were injured.

Wherefore, etc.

NOTE.— A carrier may refuse to receive articles improperly packed, but if received must use due care, and if lost must show that it was caused by the defective packing. *Union Exp. Co. v. Graham*, 26 O. S. 595.

CHAPTER 27.

CONTEMPT.

Sec. 425. What are contempts of court.	Sec. 429. Information charging contempt in writing scurrilous articles in newspaper.
426. What contempts may be punished summarily.	430. Proceeding upon filing of charge.
427. Charge in proceedings for contempt — How made.	431. The hearing.
428. Charge of contempt for assaulting officer.	

Sec. 425. What are contempts of court.—The code provides that disobedience, or resistance to a lawful writ, process, order, judgment or demand of a court or an officer, or misbehavior of an officer in court or in his official transactions, or a failure to obey a subpoena, or a refusal to be sworn or to answer as a witness, or the rescue or attempted rescue of a person or of property in the custody of an officer, or the failure of a person to appear as a witness in compliance with a recognizance, constitute contempts of court.¹ In addition to this provision there are other acts which are made contempts by adjudication and statutory enactment. Where a person summoned as a juror refuses to serve without reasonable excuse;² or a garnishee who has been regularly served with process fails to appear and answer;³ or a person refuses to be sworn or to answer as a witness, except in cases where fees are not paid;⁴ or the non-performance of an act ordered to be done by an award;⁵ or disobedience of an order of a referee;⁶ or an interference with an officer appointed by

¹ O. Code, sec. 5640.

² R. S., sec. 5178.

³ R. S., sec. 5549.

⁴ R. S., secs. 5252, 5605. See 15 W. L. B. 192; *Id.* 267; 10 O. 836. *Contra*, 8 O. C. C. 264; 4 W. L. B. 457; R. S., secs. 5254-5257; 15 W. L. B. 192.

A notary public in taking depositions has power to punish for

contempt a witness who refuses to answer. *De Camp v. Archibald*, 81 W. L. B. 39; 50 O. S. 618; *Dogge v. State*, 21 Neb. 273-8; *In re Abeles*, 12 Kan. 451; *Ex parte McKee*, 18 Mo. 599; *Burnside v. Dewstoe*, 15 W. L. B. 197.

⁵ R. S., sec. 5610.

⁶ R. S., sec. 5481.

court;¹ or disobedience by a witness of an order requiring a separation of witnesses;² or a refusal to pay alimony;³ or disobedience of an order to abate a public nuisance;⁴ or refusing to make a return of a writ of *habeas corpus*;⁵ or a purchaser at a sheriff's sale failing to pay the purchase-money,⁶ are all declared or held to be contempts of court. A witness is guilty of contempt if he refuses to testify as an expert without being paid extra compensation.⁷

The delivery to the sheriff of property attached for which an undertaking has been given, or the payment of money due upon such undertaking,⁸ or the deposit or delivery of money or other thing, may be enforced by proceedings in contempt.⁹ And so may disobedience of an injunction or restraining order be punished as a contempt.¹⁰ But the payment of a debt where there has been no fraud practiced cannot be enforced as for contempt.¹¹ Removing a witness from the county of his residence where he is under subpoena to attend upon the trial of a pending cause, is a contempt.¹²

As a receiver is an officer of court, and the property placed in his hands is in fact in the custody of the court, it follows that any interference with the same in any manner is in contempt of court. Any one who attempts to levy an execution or an attachment upon the property, or who interferes therewith in any manner, is guilty of contempt.¹³ The title to property passes the moment the order appointing the receiver is made, whether reduced to possession or not, and even before the appointment is in all respects perfected;¹⁴ so that a second receiver, subsequently appointed, if only an hour or more in-

¹ *Spinning v. Oil and T. Co.*, 2 Disn. 361; *Eiselman v. Thill*, 1 C. S. C. R. 188.

² *Dickson v. State*, 39 O. S. 73.

³ *Kaderabek v. Kaderabek*, 3 O. C. C. 419; *Rapalje on Contempt*, sec. 36. There can be no punishment where it is not within the power of the party to pay. *Pancost v. State*, 15 O. C. C. 246.

⁴ *Schultz v. State*, 33 O. S. 276.

⁵ *Newman's Case*, 1 W. L. J. 168.

⁶ R. S., sec. 5397.

⁷ *State v. Darby*, 17 W. L. B. 62; *Ex parte Dement*, 53 Ala. 389; *People v. Montgomery*, 18 Abb. Pr. (N. S.) 207; *Buchanan v. State*, 25 Am. Rep. 620.

⁸ R. S., sec. 5556.

⁹ R. S., sec. 5598.

¹⁰ R. S., sec. 5581.

¹¹ *Union Bank v. Bank*, 6 O. S. 255;

See *Edgarton v. Hanna*, 11 O. S. 323;

McClelland v. Bishop, 42 O. S. 113.

¹² *Hale v. State*, 55 O. S. 210, overruling *Baldwin v. State*, 11 O. S. 681.

¹³ *Richards v. People*, 81 Ill. 551; *Read v. Brayton*, 25 N. Y. S. 186; *Noe v. Gibson*, 7 Paige, 518.

¹⁴ *Steele v. Sturges*, 5 Abb. Pr. 442; *In re Berry*, 26 Barb. 55; *Hazelrigg v. Bronbaugh*, 78 Ky. 62; *Storm v. Waddell*, 2 Sandf. 494; *Wilson v. Allen*, 6 Barb. 542; *Maynard v. Bond*, 67 Mo. 315.

tervenes, cannot assume control of the property, even though he perfects his appointment first, and any interference by him will be in contempt.¹ In fact, all parties implicated in a proceeding for the appointment of another receiver under such circumstances are amenable to the court. There is no immunity for counsel who advise or through whose instrumentality and professional aid the same is prosecuted.² It is not considered essential that a person be officially apprised of a receiver's appointment to render him liable for contempt, but actual knowledge of the granting of an order is sufficient to fix the responsibility.³ It will be adequate notice to fix the liability if a person in court informs another of the order made;⁴ and it is immaterial whether the order has actually been drawn or not, so long as parties have knowledge that it is made.⁵ These principles are applicable to all orders, such as injunction and the like.

Newspapers can not be held for contempt when they give fair, accurate and impartial reports of trials, nor for editorial comments made fairly and in good faith, but they can not criticize a court, its officers, attorneys, witnesses, or parties unjustly or intemperately, or publish a false or unfair report during the pendency of a case, if it tends to prejudice the public, or jury, or to obstruct the administration of justice, without becoming liable for contempt.⁶ Newspaper comments, though libelous, having no relation to proceedings of a court which are wholly past and ended, are not in contempt of court.⁷

Sec. 426. What contempts may be punished summarily.—A court or judge at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.⁸ The power thus conferred upon a judge at chambers is not extended to all orders. The authority of courts to punish the specific acts as provided in the several provisions of the code is conferred only upon the court, and not upon the judge or judges sitting at chambers.⁹ Constitutional courts, however, are possessed of an inherent power to punish summarily persons guilty of direct or constructive contempts of court, independently of statute. The general assembly is without authority to abridge the power of such courts.¹⁰ It is inherent in courts of general juris-

¹ *Spinning v. Insurance Co.*, 2 Disn. 336; *People v. Bank*, 53 Barb. 412; S. C., 35 How. Pr. 428. See *Pugh v. Brown*, 19 O. 202.

² *Spinning v. Insurance Co.*, 2 Disn. 336, Gohlson J., on page 345, etc.; *High on Receivers*, sec. 51; *Mahoney v. Belmont*, 62 N. Y. 133.

³ *Allen v. State*, 61 Ga. 166; *Lewis v. Singleton*, 61 Ga. 164.

⁴ *Hull v. Heed*, 3 Edw. Ch. 286.

⁵ *High on Receivers*, sec. 166.

⁶ *In re Press Post*, 6 Oh. Dec. 10.

⁷ *Post v. State*, 7 Oh. Dec. 257; 14

C. C. 111.

⁸ R. S., sec. 5639.

⁹ *Davis v. State*, 50 O. S. 194.

¹⁰ *Hale v. State*, 55 O. S. 210.

diction independent of legislation, and has always existed in the courts of England and in this country. The legislature may regulate that power of the court.¹ The statute is declaratory of the common law on the subject of contempts, and hence a court may punish one who assaults an officer of court, as the prosecuting attorney, during the progress of a trial, even though it occurs during a recess and outside the court room.²

Sec. 427. Charge in proceedings for contempt—How made.—Strictly speaking, there are no pleadings in proceedings for contempt, and hence it is immaterial whether the charge be sworn to or not, although the practice in some jurisdictions may require affidavits.³ The proceeding must be conducted in the name of the state and partakes of the nature of a prosecution.⁴ The charge must be reduced to writing and the accused given an opportunity to be heard in his defense,⁵ although it has been considered doubtful whether any complaint is in fact necessary,⁶ which, however, has special reference to a formal pleading, as it is essential that a written charge be made and filed with the clerk.

One course pursued to institute proceedings in contempt is to verbally call the attention of the court to the alleged contempt, and ask that an order be made appointing counsel to file charges, which may be as follows:

State of Ohio }
vs. }
Philip Roe. }

Information having been brought to the court of an alleged violation of an order made on the _____ day of _____, 18—
[state nature of order] [or, if contempt be one other than a violation of an order it may be varied to suit]; it is therefore ordered that A. B., an attorney of this court, be and he is hereby appointed and instructed to prepare and prefer, in writing, appropriate charges of contempt of this court, claimed to have been committed by the said Philip Roe, and file the same in this court on or before ____.

Illustrations of charges are given in the next sections, followed by subsequent proceedings.

Sec. 427a—Same continued—Nature of the charge further considered.—There is no doubt in cases where the

¹ Post v. State, 14 O. C. C. 111; 7 Oh. Dec. 257. ing an alleged contempt do not come within the personal knowledge

² State v. Steube, 19 W. L. B. 181; of the court through its own senses, State v. Myers, 19 W. L. B. 302. See, the better practice is to file an information by a proper representative of the state, and permit the United States v. Patterson, 26 Fed. Rep. 511; In re Dandridge, 2 Va. accused to file an answer to the charge made against him. Post v. Cases, 408.

³ Steube v. State, 3 O. C. C. 384. State, 14 O. C. C. 111; 7 Oh. Dec.

⁴ State v. Clemens, 6 W. L. J. 538. 257.

⁵ Lowe v. State, 9 O. S. 338. ⁶ Steube v. State, 3 O. C. C. 384.

Where the transactions constitut-

contempt is not committed *in facie curiae*, but that the charge must be in writing, as that is the requirement of the statute; but there is an absence of any further direction. Shall it be drawn then after the manner in which pleadings in civil causes are drawn, or it being of a *quasi* criminal character, must it be drawn with the same strictness as an indictment? In some jurisdictions the practice is to prefer the charge by indictment or information.¹

It is only necessary to give "the respondent sufficient information concerning the nature and the particulars of the offense charged."²

A charge in writing which states the essential facts showing contempt is sufficient. A very convenient and proper practice is to prepare a charge, the defendant an answer, and the complainant a reply, in cases where the controversy is of such nature as to justify such a course.

Sec. 427b. How shall the proceeding be entitled.—There is also an absence of any direction in the statute as to the style which the proceeding must assume, and the practice in this respect is varied. And so with the authorities. The course pursued in Ohio, so far as the reported cases show, is that given in a former section,³ giving to the proceeding a specific title in the name of the state.⁴

The proceeding is also commenced in many instances under the style of the original case in which it is complained that the order has been violated or the contempt committed. This is often more convenient from the nature of the case, and is supported by authority.⁵

Sec. 428. Charge of contempt for assaulting officer.—

This day came J. T. H., one of the attorneys of said court, specially appointed by the court herein to file and prosecute a charge of contempt against the defendant F. S., and complains to the court that on the — day of —, 18—, said defendant F. S., one of the witnesses for the defendant in the case of — against —, then pending and still on trial in this court, during a recess in said trial at —, within said county of —, and state of Ohio, unlawfully and wrongfully assaulted, struck, wounded and thereby disabled from proceeding with the trial of said cause of — against —, one C. H., the duly elected, qualified and acting prosecuting attorney within and for said county and one of the officers of this court, theretofore and then engaged in conducting the trial of said cause on behalf of the state of Ohio, said assault,

¹ Rapalje on Cont. sec. 93.

⁴ In re Post, 14 O. C. C. 111; 7 Oh.

² Bates Case, 55 N. H. 375; Rapalje Dec. 257; see cases cited generally on Cont. sec. 172; Post v. State, 14 in this chapter.

O. C. C. 111.

⁵ 4 Enc. of Pl. & Pr. 773; Rapalje

³ Ante, sec. 427.

on Cont. sec. 95.

striking, wounding and disabling of said C. H. being so made and done by said F. S. in the presence of the court, with the intent and thereby to obstruct the administration of justice in said cause. Said F. S. was then and thereby guilty of obstructing the administration of justice and of contempt of this court, contrary to the statute in such case made and provided.

Sec. 429. Information charging contempt in writing scurrilous articles in newspaper.—

The State of Ohio }
 vs.
 A. B. }

In obedience to the order of this court, the state of Ohio, by J. T. H., T. P. L. and J. H. C., members of the bar appointed by the court for that purpose, charges and states that on the — day of —, 18—, in the presence of the said court of common pleas of said — county, and state of Ohio, A. O. M. was guilty of misbehavior and contempt of court, in this, to wit:

That said court was on said day and had been from on or about the — day of —, 18—, next preceding, engaged in the trial of the case of — v. — upon an indictment for —, which said indictment was duly found and returned at a former term of said court by a grand jury, duly drawn, summoned, impaneled and sworn to inquire into said offense and others within the body of said county [*or if civil case, state the nature*].

That at the time said special grand jury was ordered, drawn, summoned, impaneled and sworn, the Hon. D. F. P. was one of the judges of said court; that one C. H. was the prosecuting attorney of said county, and that one J. J. J. was the clerk of said court.

That the said Hon. D. F. P. was, on the — day of —, 18—, the judge of said court sitting in the trial of said case of the State of Ohio against —; that said C. H. was on said day the prosecuting attorney of said county engaged in the trial of said case in behalf of the state of Ohio; and one G. K. N. was on said day a duly admitted and practicing member of the bar of said state, and as an officer of said court was engaged for the state in the trial of said case.

That on the said — day of —, 18—, said A. O. M., to vilify, degrade and defame said court and its said several officers, to wit, D. F. P., C. H., G. K. N. and J. J. J., and the grand jurors who found and presented said indictment, and to bring the said court and its said officers into contempt, and to obstruct the administration of justice in said cause theretofore, then and still pending and on trial in said court, did write and publish, and cause to be published in the C. E., a newspaper printed at the city of C., in the county of —,

and state of Ohio, and caused to be published and circulated throughout said state and in the said county of F., in the presence of the said court, a certain libelous, false and malicious article, a copy of which is as follows, to wit: [*Insert copy of article.*]

That said Hon. D. F. P., the judge of said court, on said — day of —, 18—, is the person referred to in said article as “D. P.”

That the said C. H., the said prosecuting attorney on said day, is the person referred to in said article as “C. W. H.”

That the said J. J. J., clerk of said court at the time said grand jury was drawn and impaneled, is the person referred to in said article as “the clerk.”

That said G. K. N. was on the said — day of —, 18—, an officer of said court, as aforesaid.

Wherefore said A. O. M. is guilty of contempt of said court, contrary to the laws of the land.

NOTE.—From *Myers v. State*, 46 O. S. 478.

Sec. 430. Proceedings upon filing of charge.—

Upon the filing of the charge by counsel appointed for that purpose, the following entry should be made:

State of Ohio	}	Proceedings in contempt.
vs.		
Philip Roe.		

This day came A. B., heretofore appointed by this court to prepare and prefer a charge of contempt against the said Philip Roe, and on behalf of the state of Ohio, and in pursuance of said order of court, filed written charges of contempt of this court against the said Philip Roe for a violation of [*state whatever order may be*].

It is therefore ordered by the court, that a copy of said charge of contempt be forthwith served upon the said Philip Roe, together with a copy of this order, and that he be required to file his written answer to said charge of contempt on or before the — day of —, 18—, and that he appear before this court on the — day of —, 18—, at — o'clock — M., ready to answer said charge so made against him.

As clerks are not usually supplied with blanks covering this proceeding, counsel should assist in the preparation of the order to be served on the defendant, which may be as follows:

SUMMONS IN CONTEMPT.

To —, Sheriff:

Whereas on the — day of —, 18—, A. B., an attorney of this court, under an order of this court, in the name of the state of Ohio, filed a written charge of contempt of court,

alleged to have been committed by the said Philip Roe, which is as follows: [*The written charge may properly be inserted here.*]

And whereas said court of common pleas did on the — day of —, 18—, make an order, of which the following is a copy: [*Copy of order.*]

You are therefore commanded to forthwith serve a copy of this writ on the said Philip Roe, and the said Philip Roe is hereby required to file his written answer to said charge as required by said order, on or before the — day of —, 18—, and that he be and appear before this court on the — day of —, 18—, at — o'clock — M., ready to answer said charge.

You will make due return of this writ forthwith upon its execution.

In witness whereof, etc.

A day or time should be fixed for filing an answer by the person charged before the day fixed for the hearing, as it will thus necessarily save delay. It may also be necessary for counsel appointed by the court to file a reply to the answer of the accused, which may be done by the time fixed for the hearing. While the proceedings are in their nature criminal, the pleadings are substantially as in civil cases, and it may be necessary to raise an issue—at least it is best to do so in the manner indicated.

If the nature of the contempt is such that it may seem necessary to arrest the person charged, the foregoing forms may be varied.¹

Sec. 431. The hearing.— The person accused must be given an opportunity to be heard by himself or counsel,² and a day shall be fixed for his presence to answer the charge,³ at which time the court shall proceed to investigate the charge, and to hear any answer or testimony which the accused may make or offer.⁴ The hearing is conducted as an ordinary case, except that it is before the court whose order it is claimed has been violated. The person charged does not have the right to a trial by jury.⁵ It must be before the court in regular session, and not before a judge or judges sitting at chambers.⁶

¹ See Yapple's Pldg., pp. 1158-59.

² R. S., sec. 5641.

³ R. S., sec. 5642.

⁴ R. S., sec. 5644.

⁵ Ammon v. Johnson, 8 O. C. C. 268.

⁶ Davis v. State ex rel., 50 O. S. 194.

CHAPTER 28.

CONTRACTS.

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Sec. 432. Actions on contracts — The petition.— A petition which alleges the execution of a contract, and specifically sets forth the conditions and covenants to be kept and performed, and avers that the same have been violated, stating the amount of damages sustained, with a prayer for judgment, contains the essential elements of an action upon a contract.¹ It may not always be necessary to give the full details, but it

¹ Wolfe v. Schofield, 88 Ind. 175; Westbrook v. Schmaus, 83 Pac. Rep. 306; 51 Kan. 214 (1893).

will be sufficient to substantially allege the terms of a contract;¹ in any event, it is only essential to allege such facts as are material to plaintiff's cause of action.² And where a contract consists of an agreement to do several things, the conditions, stipulations and consideration as to all should be set forth.³ An allegation that the defendant agreed to do a certain thing should be taken to mean that he agreed in a valid and legal manner.⁴

The character of contracts discussed in this chapter are not those for the unconditional payment of money only, which are generally negotiable instruments, but may include those falling under section 5085 of the code as evidences of indebtedness, a copy of which must be attached to the petition. It is not necessary to here repeat what has been before stated that the copy attached cannot be made to supply the necessary averments in the petition.⁵ But the substance of such contracts, or even a copy when the same relates solely to the case, and contains all the facts which seem necessary to state the cause of action, must be given in the pleading. As to all other classes of contracts which are not "evidence of indebtedness," this rule is inapplicable, as it would burden the record and increase the costs. Hence, it is not generally considered good pleading to incorporate a copy of such contracts in the pleading. It may often become necessary, however, in assigning breaches, to substantially set out the whole contract, in which case it may be convenient to copy the same into the pleading.⁶ The better course to be adopted must necessarily depend upon the extent and nature of the contract, and the matters complained of, which rest largely in the discretion and good judgment of the pleader. Either a copy or the substance of the provisions should be inserted.⁷ In Indiana it is considered sufficient to annex a copy to the petition and aver that a contract was duly executed.⁸ Some other states adopt

¹ *Logan v. Apartment House*, 8 Misc. Rep. 296 (N. Y. Com. Pl., 1898).

² *Rollins v. Lumber Co.*, 21 Minn. 5.

³ *Detroit, etc. R. R. v. Forbes*, 80 Mich. 165.

⁴ *Jenkinson v. Vermillion*, 53 N. W. Rep. 1066 (S. D., 1892).

⁵ *Anle*, secs. 57, 847.

⁶ *Swan's Pldg.*, pp. 198-9; *Crawford v. Satterfield*, 27 O. S. 425; *McC Campbell v. Vastine*, 10 Ia. 538.

⁷ *Slack v. Heath*, 1 Abb. Pr. 381; *Stoddard v. Treadwell*, 26 Cal. 294;

Fairbanks v. Bloomfield, 2 Duer, 849.

⁸ *Straughan v. Fairchild*, 80 Ind. 596; *Whitworth v. Malcom*, 82 Ind.

the same practice, but this does not apply to Ohio. In pleading a contract partly oral and partly written it will be sufficient to plead the general effect thereof without giving a copy.¹

Sec. 433. Consideration.— It is a general rule that a contract in writing is supported by a valid consideration, and therefore it is not necessary to allege the fact that it was made upon a consideration.² A different rule, however, prevails as to a verbal contract, in which case it is held to be essential to plead the consideration on which it is based.³ The practice, however, in all cases is to aver consideration, which is commendable. The law does not look into the question of adequacy of consideration but will leave that to the parties.⁴

Sec. 434. Conditions in contract.— The rule of pleading conditions has been fully discussed elsewhere in a general way.⁵ Before a person can recover on a contract he must show that he has complied with all its terms and conditions on his part to be performed.⁶ The rules of common-law pleading required that the facts showing the performance of conditions precedent be set out in detail, and was a subject attended with much difficulty which the code was intended to obviate.⁷ When, therefore, a demand of performance is necessary to fix the liability of a party to a contract, it will be sufficient to aver generally that the plaintiff has performed all the conditions on his part.⁸ An allegation, however, that a contract "has been a valid and subsisting one ever since the date of its execution, and is still valid and subsisting and binding on said plaintiff," is not a sufficient averment of performance.⁹

If the facts pleaded show a repudiation of a contract by the

454; *Insurance Co. v. Hazelett*, 105 Ind. 212. A verbal contract does not of course fall within the rule requiring a copy to be made part of the petition. *Hydraulic Co. v. Wilson*, 83 N. E. Rep. 118 (Ind., 1893).

¹ *Board, etc. v. Miller*, 87 Ind. 257; *Board v. Shipley*, 77 Ind. 558; *Railway v. Wray*, 52 Ind. 578.

² See cases cited *post*, sec. 453; *Williams v. Hall*, 79 Cal. 606.

³ *Acheson v. Telegraph Co.*, 96 Cal. 641; 31 Pac. Rep. 583 (1892). Where the common-law rule has not been

abrogated by statute, consideration must be briefly alleged. 1 *Parsons on Contracts* (5th ed.), 427, 428.

⁴ *Judy v. Louderman*, 48 O. S. 563; *Pilkington v. Scott*, 15 M. & W. 657.

⁵ *Ante*, sec. 59.

⁶ *Iasigi v. Rosenstein*, 20 N. Y. S. 491.

⁷ R. S., sec. 5091.

⁸ *Humphreys v. Staley*, 8 W. L. M. 628.

⁹ *Lowe v. Phillips*, 14 O. S. 308; *Crawford v. Satterfield*, 27 O. S. 424.

defendant, it will be necessary to aver performance or readiness to perform.¹ An averment that plaintiff is ready and willing to accept property and make payment therefor cannot be construed to be an allegation of payment or of an offer to pay.² An allegation of readiness to perform is not necessary where the pleading shows that a defendant has, without sufficient cause, announced that he will no longer perform his part of a contract.³

§ 435. *Assigning breaches.*—A pleading which fails to allege a breach of contract is bad upon demurrer,⁴ and in assigning the same it is essential that all facts constituting the breach be alleged,⁵ which should be in unequivocal language and not left to inference.⁶ The practice generally followed is to assign the breach in the words of the contract.⁷ Where a contract is made to do a certain thing and the party presents himself in readiness to perform the same, and is directed to do another and different thing, he may consider it a breach and maintain an action at once.⁸ If a contract has been repudiated by one of the parties before the time for its performance has arrived, the other party must show full compliance with conditions precedent before he can maintain an action thereon,⁹ as one who has not complied with his part of the contract cannot call upon the other to respond in damages.¹⁰ Nor will a breach by one party give the other a right to go on and perform so much of the contract as he may see fit, and recover therefor, without regard to the price paid;¹¹

¹ Riley v. Walker, 84 N. E. Rep. 100 (Ind. App., 1898).

² Bailey v. Lay, 83 Pac. Rep. 407 (Colo., 1898).

³ Riley v. Walker, 84 N. E. Rep. 100 (Ind. App., 1898).

⁴ Rich v. Calhoun, 12 So. Rep. 707 (Miss., 1893); Phipps v. Hope, 17 O. S. 586.

⁵ Branham v. Johnson, 62 Ind. 259; Moore v. Besse, 80 Cal. 570; Ward v. Hogan, 11 Abb. N. C. 478; Marie v. Garrison, 13 J. & S. 157. A breach may sometimes be set forth in a general way. Rowland v. Phalen, 1 Bosw. 43.

⁶ Moore v. Besse, 80 Cal. 560; Brown

v. Champlin, 66 N. Y. 214. It will be sufficient to aver the contract, the breach complained of, and general damages. Bearber v. Cozalis, 30 Cal. 92.

⁷ Jones v. Sales, 25 Ia. 25; Brown v. Stebbins, 4 Hill, 154; Guttridge v. Vanatta, 27 O. S. 366.

⁸ Campbell v. Jimenes, 28 N. Y. Supp. 312.

⁹ Elsas v. Meyer, 21 W. L. B. 346; Neale v. Ratliff, 15 Q. B. 916; Hickman v. Royle, 55 Ind. 531. See 9 W. L. B. 181.

¹⁰ Tufts v. Saus, 47 Mo. App. 437.

¹¹ McGregor v. Ross, 96 Mich. 103; 55 N. W. Rep. 658 (Mich., 1893).

but where one party to a contract, without fault on the part of the other, fails to perform his part so as to enable him to sue, he may nevertheless recover for the benefit derived by the other party, less any damages sustained by partial non-performance.¹

Sec. 436. Judgment where several liable.—The common-law rule that recovery must be had against any or all parties to a joint contract was modified by the code so as to allow judgment to be entered for or against one or more of several defendants who are liable in a joint action, without subjecting the plaintiff to the necessity of bringing a new action; and a judgment rendered for those who are found not liable and against those liable.² If there be doubt as to the fact of such judgment, it would be proper to make an amendment.³ Judgment may, in the discretion of the court, be taken against one or more, leaving the action to proceed against others, which will operate as a severance of the cause of action as to the remainder, which may be heard and determined as if they were sued alone, and judgment rendered against them for the whole or part of the cause of action as may be proved against them.⁴

Sec. 437. Entire contract.—Where a contract is entire and is abandoned after part performance without cause, there can be no recovery even *pro tanto* unless the assent of the other party to the abandonment be shown.⁵ Accommodation indorsement is an entire contract and cannot be filled up so as to make the note payable part to one person and part to another.⁶ A judgment on an entire contract which has been severed merges the whole,⁷ and the right is exhausted by a single suit.⁸ Where there has been a part delivery of goods

¹ Lyon Co. v. Lund, 38 Pac. Rep. 51 Ind. 535; Hubbell v. Wolfe, 15 Ind. 595 (Kan., 1898). See, also, Branham v. Johnson, 62 Ind. 259-63.

² Lampkin v. Chisom, 10 O. S. 450; Brumskill v. James, 1 Kern. 294; Marquat v. Marquat, 2 Kern. 336.

³ Lampkin v. Chisom, *supra*.
⁴ O. Code, secs. 5811-12; Hempty v. Ranson, 38 O. S. 319; Aucker v. Adams, 28 O. S. 543; Roby v. Rainsberger, 26 O. S. 676; Stafford v. Nutt,

51 Ind. 535; Hubbell v. Wolfe, 15 Ind. 204; Carr v. Beckett, 1 O. C. C. 72.
⁵ Allen v. Curles, 6 O. S. 505; Goldsmith v. Hand, 26 O. S. 101-4.
⁶ Erwin v. Lynn, 16 O. S. 539.
⁷ Erwin v. Lynn, *supra*.
⁸ Stein v. Steamboat, 17 O. S. 471-5; Beldernagle v. Cocks, 19 Wend. 207; Fish v. Tolley, 6 Hill, 54; Secor v. Sturges, 6 N. Y. 548; Logan v. Coffrey, 30 Pa. St. 196.

sold, recovery cannot be had for their value without delivery of all.¹ The giving of a note will sometimes amount to a severance of an entire contract;² and where a tripartite has been entered into, and two of the three parties fail to perform their respective portion, they may be compelled to perform or pay damages at the suit of a third party who performs or tenders performance.³

Sec. 438. General rules.—Although recovery cannot be had on a verbal contract not to be performed within one year, it is otherwise if the same has been partially performed.⁴ Proof of alteration or interlineation in a contract cannot be introduced unless the same be alleged in the pleading;⁵ and so with an oral modification of a written contract.⁶ Where a contract sued upon depends upon the terms of another, the provisions of the latter must be set forth in the pleading;⁷ and in framing a pleading upon an implied contract, it is necessary only to allege the facts showing the data from which the law implies a promise.⁸ If one person for a good consideration makes a promise to another for the benefit of a third, such third person may maintain an action thereon.⁹ An allegation of a contract in the petition, not controverted by answer, will be taken as true; and an averment of a different contract in the answer will not amount to a denial.¹⁰ Where the facts set forth clearly constitute a cause of action upon contract, an allegation giving it the aspect of a tort will be treated as surplusage and will not change the nature of the action.¹¹ So where a commission merchant retains the proceeds of goods

¹ *Witherow v. Witherow*, 16 O. 288.

² See *Loomis v. Eagle Bank*, 10 O. S. 327.

³ *Wade v. Pollock*, 1 C. S. C. R. 458.

⁴ *Towsly v. Moore*, 80 O. S. 184.

⁵ *Shelton v. Reynolds*, 111 N. C. 595; 16 S. E. Rep. 272 (1892).

⁶ *Henry v. Clelland*, 14 Johns. 400; *Sansford v. Halsey*, 2 Disn. 258. See *Building Contract*, sec. 489, *post*.

⁷ *Toole v. Baer*, 16 S. E. Rep. 878 (Ga., 1892).

⁸ *Maxwell on Code Pldg.* 85, and cases cited; *Farron v. Sherwood*, 17 N. Y. 227.

⁹ *Thompson v. Thompson*, 4 O. S.

333; *Crumbaugh v. Kugler*, 8 O. S. 544; *Emmett v. Brophy*, 42 O. S. 82; *Riordan v. Church*, 28 N. Y. Supp. 828.

¹⁰ *Marx v. Gross*, 22 N. Y. Supp. 898; *Fleischman v. Stearn*, 90 N. Y. 110; *Simmons v. Green*, 35 O. S. 104; 9 O. C. C. 203.

¹¹ *Greentree v. Rosentock*, 61 N. Y. 583; *Segelken v. Meyer*, 94 N. Y. 484; *Conaughty v. Nichols*, 42 N. Y. 83; *Ledwick v. McKim*, 53 N. Y. 307-316; *Whereatt v. Ellis*, 58 Wis. 627.

sold by him, the action for its recovery should be upon contract, and not for commission.¹ Where work done under a contract, though not in strict accordance with its terms, is accepted by or has benefited the other party, a recovery may be had for what it is really worth. And so with one which has been waived, or where the plaintiff has been prevented from doing the work.² In a suit for work, labor and materials, it is not necessary to declare upon contract, but a declaration may be made generally for the value of the work and reference made to the contract to determine the value.³ Where money is claimed upon contract the petition must show that the same is due and unpaid.⁴ An allegation, however, that a sum sued for is now due is a mere conclusion of law.⁵ Where the action is for the recovery of something more than money, as for damages, it is not necessary to aver that the damages are due and unpaid.⁶

Sec. 439. Actions on building contract.—The general rule applicable to all kinds of contracts which requires only a substantial compliance therewith, and excuses technical, inadvertent and unimportant omissions and defects, is equally applicable to building contracts.⁷ This rule allows a recoupment in damages for any material deficiency.⁸ Slight defects in the performance of a building contract will not prevent recovery of the price therefor.⁹ If the specifications have been disregarded, recovery may nevertheless be had for the contract price, less the cost of making the building conform to the plans.¹⁰ Where work is done under a contract which is at variance with the strict terms of the agreement, and payments

¹ *Greentree v. Rosentock*, 81 N. Y. 588; *Walter v. Bennett*, 16 N. Y. 250; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Harris v. Schultz*, 40 Barb. 815.

² *Newman v. McGregor*, 5 O. 352; *Edgerton v. Coates*, W. 84; *Ames v. Sloat*, W. 577; *Bagley v. Bates*, W. 705; *Sperry v. Johnson*, 11 O. 452.

³ *Higgins v. Railroad Co.*, 66 N. Y. 604; *Farron v. Sherwood*, 17 N. Y. 227; *Fells v. Vestvali*, 2 Keyes, 152; *Larson v. Schmaus*, 81 Minn. 418.

⁴ *Goodman v. Gordon*, 87 Ind. 126; *Boone's Pldg.*, secs. 26, 135, 150, 104.

⁵ *Doyle v. Insurance Co.*, 44 Cal. 264; *Roberts v. Treadwell*, 50 Cal. 520; *Frisch v. Culer*, 21 Cal. 71. See *ante*, sec. 51.

⁶ *Riley v. Walker*, 84 N. E. Rep. 100 (Ind., 1898).

⁷ *Ashley v. Henahan*, 56 O. S. 559.

⁸ *Elsas v. Meyer*, 21 W. L. B. 348; *Mehurin v. Stone*, 37 O. S. 49; *Goldsmith v. Hand*, 26 O. S. 101.

⁹ *Horgan v. McKenzie*, 17 N. Y. S. 174; *Crouch v. Gutman*, 31 N. E. Rep. 271 (N. Y., 1892), and cases cited.

¹⁰ *Scheible v. Klein*, 89 Mich. 376; 50 N. W. Rep. 857.

have been made thereon during the progress of the work without objection, recovery may be had for an unpaid balance without showing that the contract has been strictly performed.¹ Formerly, where a contract provided that work was to be subject to the approval of an architect, there could be no recovery unless it was so approved; but the rigor of this rule has been so far relaxed as to allow recovery when there has been a substantial compliance in good faith.² In bringing an action upon a contract it must be averred that the work was approved by the architect, or a reason given for failure so to do.³ Such an allegation is unnecessary, however, where it is alleged that the plaintiff "performed each and every requirement by him contracted, as set forth in the contract," or where a general averment of performance of conditions precedent is made.⁴ All of the facts relating to the performance and deviation from the contract should be fully set forth and not alleged in a general way. This cannot be done in the reply if inconsistent with the allegations of the petition.⁵ Where a certificate has been demanded of an architect and the same unjustly refused, the condition of the contract as to the certificate of the architect ceases to be a condition precedent to recovery.⁶ A provision that an architect's certificate for extra work shall be final is binding on the parties.⁷ A contractor may recover for extra work rendered necessary by a violation of an agreement by the owner.⁸ And where an action is brought for defects in the work of constructing a building, the same must be fully set

¹ *Goldsmith v. Hand*, 26 O. S. 101; *Wilcox v. Stephenson*, 1 So. Rep., Woodward v. Fuller, 80 N. Y. 812; 659 (Fla., 1892).

Noland v. Whitney, 88 N. Y. 648. See, also, *Loeffler v. Froelich*, 85 Hun, 868; *Coon v. Water Co.*, 25 Atl. Rep. 505 (Pa., 1898); *Arnold v. Bournique*, 33 N. E. Rep. 580 (Ill., 1893).

² *Kane v. Stone*, 39 O. S. 1-11; *Mehurin v. Stone*, 37 O. S. 49; *Ashley v. Henahan*, 56 O. S. 559, holding that this should be confined to narrow limits and to cases where there has been an honest effort to perform. But see *Arnold v. Bournique*, 29 W. L. B. 156.

³ *Ashley v. Henahan*, 56 O. S. 559; *Butler v. Tucker*, 24 Wend. 447. The architect is the sole arbiter. *Mercer v. Harris*, 4 Neb. 73.

⁴ *Wilcox v. Stephenson*, 1 So. Rep., Woodward v. Fuller, 80 N. Y. 812; 659 (Fla., 1892).

⁵ *O'Connor v. Dingley*, 26 Cal. 11; *Evarts v. Smucker*, 19 Neb. 41; 26 N. W. Rep. 596 (1896); *Durbin v. Flak*, 16 O. S. 534.

⁶ *Highton v. Dessau*, 19 N. Y. S. 395; *Thomas v. Stewart*, 132 N. Y. 580; 80 N. E. Rep. 577. Unless it is provided in the contract that the estimate of an architect is not binding on the owner. *Schuler v. Eckert*, 51 N. W. Rep. 198 (Mich., 1892).

⁷ *Anderson v. Imhoff*, 34 Neb. 335; 51 N. W. Rep. 354 (1892).

⁸ *Becker v. National, etc. Park Co.*, 69 Hun, 55.

forth in the pleading.¹ Delay on the part of the contractors will not afford ground for refusal to pay an instalment due.² A request to stop work, if acquiesced in by both parties, will not operate as a breach, unless by way of a direction, and objection is made thereto.³ Where an owner completes a building after failure or delay by the contractor, it is not essential that the plans and specifications be strictly adhered to merely for the purpose of having correct accounts of the cost of completing the work.⁴

Sec. 440. Petition for breach of building contract.—

Plaintiff states that on the — day of —, 18—, in consideration of \$— to be paid — — [*state the payments if desired*], he entered into a contract in writing with said defendant, by virtue of which contract said defendant promised and agreed to erect and construct a certain dwelling-house on the property of plaintiff situate in the city of C., which said contract contained a provision that [*state the substance of the provision claimed to be broken*].

That the plaintiff has fully performed his part of said contract and complied with all the provisions thereof so far as he is concerned, but that the defendant wholly failed and neglected to carry out and complete his said contract, in that he [*state breaches*].

That by reason of the failure and neglect of said defendant to so fully carry out and perform his said contract plaintiff has been damaged in the sum of \$—, for which sum with interest from —, 18—, he asks judgment.

NOTE.— A copy of the contract should not be attached in this case. It would be otherwise if a suit were for the contract price.

Sec. 441. Petition for recovery of contract price, including extra work.—

1. On the — day of —, 18—, plaintiff entered into a contract in writing with the defendant, by virtue of which contract, and in consideration of the sum of \$— to be by defendant paid to plaintiff as hereinafter set forth, he agreed to erect and construct a certain building for said defendant upon his premises in the city of C., being lot No. —, etc., which said building was to be constructed in the following manner: [*Here state substance of contract.*]

It was provided by said contract that said defendant should pay said plaintiff for the construction of said building as pro-

¹ Turnbridge v. Read, 8 N. Y. S. 908; Darrah v. Gow, 77 Mich. 16; 659 (Mich., 1898).

48 N. W. Rep. 851 (1889).

² Smith v. Corn, 8 Misc. 545.

³ McGregor v. Ross, 55 N. W. Rep.

⁴ Zimmerman v. Gourgensen, 24 N. Y. S. 170.

vided by said contract and as hereinbefore set forth, said sum of \$—— in the following manner: [*State payments.*]

But plaintiff avers that on the —— day of ——, 18——, it became necessary to make certain material changes in said contract, and it was thereupon, upon said —— day of ——, 18——, mutually and orally agreed between plaintiff and defendant, that said plaintiff should do and perform the following additional work not provided for in said original contract: [*State the nature and extent of additional work.*]

And for said changes and additional work so mutually agreed upon as aforesaid by and between said plaintiff and defendant, said defendant agreed and promised to pay said plaintiff therefor the sum of \$——. Plaintiff has fully and completely carried out his portion of the contract as originally made and as modified as aforesaid and duly performed all required of him by virtue thereof.

A copy of said original written contract plaintiff attaches to his petition marked as an exhibit.

There is due and owing plaintiff from said defendant upon said contract a balance upon said original contract of the sum of \$——, being the —— instalment so agreed to be paid by said defendant, and the further sum of \$——, the amount so agreed to be paid for said extra work, aggregating the sum of \$——, for which, with interest, plaintiff prays judgment.

NOTE.— Recovery may be had for double plumbing where the contract provides that there shall be extra pay for alterations or additions. *McSorley v. Prague*, 88 N. E. Rep. 158 (N. Y., 1893). Recovery may be had for extra labor caused by neglect of the owner. *Becker v. Park Co.*, 23 N. Y. Supp. 880.

Sec. 442. Petition against contractor for failure to complete.—

[*Formal part as in ante, sec. 440.*]

That the plaintiff has performed all the conditions of said contract on his part to be performed.

That by the terms of said agreement said building was to be finished and delivered to the plaintiff on the —— day of ——, 18——, whereas in fact said defendant wholly failed to comply with his said contract in this respect and did not have said building completed until ——.

That relying on the contract with said defendant to so complete said building, plaintiff did on the —— day of ——, 18——, lease said building to one E. F. for the term of —— years, at a yearly rent of —— dollars, of which the defendant was duly notified.

That by reason of the defendant's failure to finish said building the plaintiff has been unable to give said E. F. possession of the same, and the plaintiff has thereby lost the benefit of the lease. That the plaintiff has sustained damages in the sum of \$——.

[*Prayer.*]

Sec. 443. Petition on building contract by assignee.—

The plaintiff, complaining of defendant, says that on or about the — day of —, 18—, one A. S. made and entered into a certain contract with the defendant, who had a contract with the owner, for the erection and construction of a certain store or block on [*naming location*], in the city of D., by which said S. agreed to furnish, dress and lay in the whole of the stone needed for the said block, and for the sum of — dollars each. Defendant agreed to pay to said S. and the last payment upon the last contract for said stone work, amounting to — dollars, was agreed to be paid to the said S. when the said building was to be finished. That said S. went on and furnished and laid all of said stone work according to said contract, and completed his said contract in every particular. That said building was finished on the — day of —, 18—; that defendant has paid to said S. all his said contract price, except the sum of — dollars, being a part of the last payment which fell due —. That on the — day of —, 18—, said S. assigned to said plaintiff for a valuable consideration all his right, title and interest in and to his claim against defendant for the balance due him under said contract. That the plaintiff is now the owner of the same, and that there is due and owing to the plaintiff from the defendant thereon, the sum of — dollars with interest thereon from —.

Wherefore plaintiff prays for judgment against the defendant for said sum of — dollars with interest thereon from —.

NOTE.—From *Kaine v. Stone Co.*, 39 O. S. 1.

Sec. 444. Answer of owner setting up failure to procure architect's certificate.—

[*Formal parts.*]

Defendant states that by the contract set forth in plaintiff's petition the building therein contracted for was to be completed by —, 18—; and that it was specially provided in said contract that said building was not to be accepted by defendant until the plaintiff had first obtained the certificate of A. B., the architect, that said building was properly constructed.

Plaintiff has not obtained the certificate of the said A. B. in accordance with the terms of said contract.

NOTE.—The certificate of the architect is conclusive and cannot be contradicted. *Kennedy v. Poor*, 25 Atl. Rep. 119 (Pa., 1892).

Sec. 445. Illegal contracts.—It is a well-understood principle of law that where parties to a transaction have woven a web of wrong or fraud around it, a court will not unravel the threads and separate the good from the bad. But where there

are two considerations supporting a contract, one of which is lawful, the other void, and the one can not be separated from the other, the contract will be sustained so far as possible. This cannot be done, however, where one of two considerations is unlawful, as the whole consideration is the basis for the whole promise, and the parts are inseparable.¹ Nor will a court enforce an illegal contract while it remains executory or rescind it when executed,² but will leave the parties to their strict legal rights.³ And where one of two distinct considerations is void by statute, and the other good, the contract will be held valid to the extent of the good consideration,⁴ especially where the good may be separated from the bad.⁵ While it is true that an illegal consideration vitiates a contract, yet a vendee of goods with knowledge of the illegality cannot set up his own legal intent in bar of an action for the recovery of purchase-money.⁶ A contract not to employ one's talent, industry or capital in business cannot be enforced, as it is in restraint of trade;⁷ though a contract partially in restraint of trade, founded upon a valuable consideration, may be enforced. The pleading in such cases must allege that the restraint is partial, and that it is supported by a valuable consideration, that it is reasonable and not oppressive, in order to rebut the presumption against its validity,⁸ as parties to a contract which is contrary to public policy can receive no aid from a court of justice.⁹ A contract is made where it is delivered, and the law of the place of the delivery controls its validity.¹⁰ Thus, a contract the consideration of which is in whole or in part the suppression of a criminal prosecution, is without any legal efficacy whatever.¹¹ But where a contract is made in one state and completed in another, the cause of action accrues in the latter

¹ *Widoe v. Webb*, 20 O. S. 435, and authority cited; *Hooker v. De Palos*, 28 O. S. 251. See 2 C. S. C. R. 369.

² *Hooker v. De Palos*, *supra*; 2 Parsons on Contracts, p. 247.

³ *Kahn v. Walton*, 46 O. S. 195.

⁴ *Doty v. Bank*, 16 O. S. 133.

⁵ *Thomas v. Miles*, 3 O. S. 274.

⁶ *Kittle v. De Lamater*, 3 Neb. 334; *Smith v. Bank*, 9 Neb. 31.

⁷ *Mitchell v. Reynolds*, 1 Smith's L. Cas. 641; *Lange v. Werk*, 2 O. S. 529.

⁸ *Lange v. Werk*, 2 O. S. 520.

⁹ *Emery v. Ohio Candle Co.*, 47 O. S. 320; 11 W. L. B. 258; 12 W. L. B. 169; 9 W. L. B. 86.

¹⁰ *Baldwin v. Harrison*, 24 W. L. B. 27; s. c., 5 O. C. C. 310; *Smith v. Frame*, 3 O. C. C. 587; 3 N. Y. 266; 34 Miss. 181; 2 Handy, 42; 7 O. S. 249; 25 O. S. 621-5; 2 Disn. 9; 89 Ill. 225; 4 Allen, 364.

¹¹ *Insurance Co v. Hull*, 31 W. L. B. 235; 51 O. S. 271.

state;¹ and if it is valid where made, it will be enforced in another state, although it is such a contract as would be prohibited by the laws of the latter state, if it does not contravene good morals and is not prejudicial to public or individual rights.² Under the law of comity between states, the *lex loci contractus* governs the validity of contracts, but not the remedy or rules of evidence. If the law of the contracting state contravenes the policy of the state where the remedy is pursued, or infringes upon the rights of citizens, there is then no rule of comity requiring the latter state to enforce the contract.³ In Ohio it has been held that a contract compounding a crime, valid by the laws of the state where made, will be carried into effect.⁴

Sec. 446. Petition upon contract — Skeleton form.—

The plaintiff states that on the — day of —, 18—, the defendant entered into a contract in writing with —, by the terms of which it was agreed: [*Give substance of contract.*]

The plaintiff further says that he has in all respects fulfilled and performed all things in the said contract to be by him fulfilled and performed. The plaintiff further says that always since the — day of —, 18—, and at the present time, the defendant, in violation of his said agreement [*here state breaches of contract*], by reason whereof the plaintiff is entitled to recover from the defendant the sum of — dollars, for which he accordingly demands judgment.

NOTE.— See *Grasselli v. Lowden*, 11 O. S. 349. If there be a stipulation for liquidated damages which are uncertain and conjectural, it will be disregarded. *Id.* If an evidence of indebtedness, attach a copy; otherwise not. *Ante*, secs. 57, 432.

Sec. 447. Petition on contract for sale of goods, the proceeds of which are to be applied by vendee towards liquidation of indebtedness of insolvent vendor, for recovery of balance after payment of debts.—

[*Caption, etc.*]

That on the — day of —, 18—, plaintiff was in failing circumstances and unable to meet his debts then due and to become due, and that in order to effect a compromise with

¹ *Correll v. Construction, etc. Co.*, 16 S. E. Rep. 156 (S. C., 1892). *Goudy v. Gebhart*, 1 O. S. 266; 1 Daniel's Neg. Inst., sec. 865; *Hill v.*

² *Harrison v. Baldwin*, 5 O. C. C. 310; *Delayhe v. Heitkemper*, 16 Neb. 478; *Herrick v. Railway Co.*, 31 Minn. 11; 16 N. W. Rep. 418. *Spear*, 59 N. H. 253; *Greenwood v. Curtis*, 6 Mass. 358.

³ *Baldwin v. Harrison*, 24 W. L. B. 27; *aff'd*, 5 O. C. C. 310, but pending in supreme court.

⁴ *Kanag v. Taylor*, 7 O. S. 134, 142; ing in supreme court.

his creditors, and to prevent a sacrifice of his said stock of goods, he entered into a contract with the defendant, J. C. S., by the terms of which contract plaintiff sold and transferred all his stock of goods then invoiced, together with the fixtures about and in his business house, and accounts due said plaintiff, amounting to the sum of \$——.

Said J. C. S., by the terms of said contract, was to use the amount of property and accounts above sold and transferred to him in payment of the debts of said plaintiff by way of compromise as he should be able to obtain said claims against said plaintiff, said J. C. S. not to pay out on the said claims against said plaintiff a sum exceeding the sum of \$——, and the said J. C. S. was to pay balance, after paying debts of plaintiff, to this plaintiff.

Plaintiff herewith files a copy of said contract with all indorsements.

Plaintiff further says that the said J. C. S. took possession of said stock of goods, fixtures and accounts sold to him by the plaintiff, and entered upon and executed the trust created by said contract, and settled and compromised and paid off the debts of said plaintiff.

The debts of said plaintiff amounted, at the time of said sale and transfer to said J. C. S. of said stock of goods, to the sum of \$——, and were to the following persons, to wit: [*Names of debtors.*]

And that the said J. C. S. paid off and settled the above-mentioned claims as follows: [*Names of debtors paid.*] The whole amount paid by said defendant J. C. S. in payment and satisfaction of all the claims against the plaintiff being \$—— and no more, and leaving a balance in the hands of said J. C. S., after paying all the debts of said plaintiff, to the amount of \$——.

Plaintiff avers that all said claims against him were compromised and paid off on the —— day of ——, 18——, and plaintiff avers that he repeatedly requested J. C. S. to account to him for the balance in his hands after the payment of his debts aforesaid, but the defendant, J. C. S., has neglected hitherto and still neglects and refuses to pay over or to account to plaintiff for said balance.

Plaintiff avers that there is due him from the defendant, J. C. S., on the claim set up in the petition, the sum of \$—— with interest thereon since ——, 18——, and for which sum, with interest, he asks judgment against the said J. C. S., and for other relief. Plaintiff also asks that the defendant, J. C. S., may make true answers to the interrogatories attached to the petition by plaintiff touching the subject-matter of this suit.

NOTE.—Taken from *Bryant v. Swetland*, 48 O. S. 194.

Sec. 448. Petition for breach of verbal contract of sale.—

That on or about the — day of —, 18—, the said plaintiff entered into a verbal agreement with said defendant, whereby the said defendant promised and agreed with said plaintiff that in consideration of the said plaintiff purchasing from said defendant a certain newspaper, known as the — Gazette, together with the good will of the same and all type, fixtures and appliances of said newspaper, and paying therefor the sum of — dollars, that he, the said defendant, would furnish and provide the said newspaper, for the consideration aforesaid, with a new dress.

Plaintiff avers that he did so purchase said newspaper and has duly performed all the conditions of said contract on his part to be performed, but said defendant has failed to fulfill his part of said contract in this, to wit: He has failed and refuses to provide and furnish said newspaper with a new dress.

Plaintiff further says that at the time of entering into said contract a new dress for said newspaper was reasonably worth the sum of — dollars; that said defendant has paid thereon the sum of — dollars; that no other payments have been made thereon, and that there is due and unpaid to said plaintiff from said defendant the sum of — dollars.

Wherefore the plaintiff prays judgment against the said defendant for the sum of — dollars, damages so as aforesaid sustained.

NOTE.— From *Gaumer v. Riley*, Supreme Court, unreported, No. 1627.

Sec. 449. Petition for breach of contract for sale of patent-right.—

The plaintiff says that on or about the — day of —, 18—, he entered into a contract with the defendants, whereby said defendants, under the firm name as aforesaid, agreed and bound themselves to sell and convey unto this plaintiff, for the consideration of — dollars in hand paid by this plaintiff, the undivided — interest in the states of — and —, in certain letters patent granted by the United States of America, for a certain invention known as —.

That at the date of said contract plaintiff paid to said defendants said sum of — dollars, and said defendants agreed that within a reasonable time thereafter they would convey to said plaintiff said — interest in said letters patent for said states, which time has long since elapsed; yet said defendants have not conveyed said interest and are unable to do so, for the reason that they have not title to the same; that said defendants, neither at the time of said meeting nor at any other time, have owned any valid patent as warranted by them; that in fact said defendants never had any valid patent for any such improvement, for the reason that said pretended patent was

at all times void and absolutely worthless, that the same had been invented and publicly used by parties long prior to said pretended invention and patent.

Wherefore plaintiff says that there was a total failure of the consideration of — dollars so paid by him, and a breach of said warranty in said contract.

The plaintiff further says that on — —, 18—, he served notice upon said defendants to make said title to him within — days or he should annul said contract and bring suit to recover back said money paid, which notice was disregarded by defendants, and on — —, 18—, said plaintiff served written notice upon said defendant that he did cancel said contract.

The plaintiff says that by reason of the failure aforesaid he has been damaged in the sum of — dollars, with interest from — —, 18—, and for which sum with costs of suit he prays judgment.

NOTE.— From *Kernohan v. Clemmens*, Supreme Court, unreported, No. 1860.

Sec. 450. Petition on a contract for assignment of letters patent, for recovery of profits derived from manufacture and sale of commodities.—

[Caption.]

Plaintiff herein, complaining of the above-named defendant, shows to this court, and alleges: (1) On information and belief that, at all the times hereinafter mentioned, the defendant was and still is a corporation duly created, organized and existing under the laws of the state of —. That heretofore there was issued, in due form of law, unto this plaintiff by the United States of America, five several letters patent, as follows, to wit: Number 329,284, granted, etc., and being the same letters patent mentioned in the contract duly made, executed and delivered interchangeably between the parties thereto, a copy of said agreement being hereunto annexed. That thereafter, and under and by virtue of said annexed contract in that behalf, this plaintiff did, on or about — —, 18—, duly assign, transfer and set over unto the defendant, for its use and at its request, the letters patent aforesaid. That thereafter, and ever since, the defendant, as plaintiff is informed, verily believes and alleges, has manufactured and sold under said letters patent and contract upwards of — of the commodities thereby covered and referred to, and that, after all the deductions authorized by said agreement from the proceeds of such sales, there remains received by defendant, and being net profits, the sum of — dollars. That plaintiff has duly and fully done and performed all the matters and things by him to be done and performed under said contract on his part, and from said defendant demanded his

said moiety of net profits thereunder accordingly, but the defendant has refused to pay over said moiety or account therefor, to plaintiff's damage — dollars. Wherefore plaintiff demands judgment against defendant for — dollars, besides the costs and disbursements of this action.

NOTE.— Approved in *Dalzell v. Watch-case Co.*, 83 N. E. Rep. 1071 (N. Y., 1898).

Sec. 451. Petition for breach of contract for delivery of goods.—

[*Caption.*]

Plaintiff says that on or about the — day of —, 18—, the defendants were the owners of and in possession of a certain crop of grapes, to wit, at — county, Ohio, on the premises of defendants, then in readiness to be harvested and for market.

Plaintiff says that the defendants then and there, in consideration of the promises of plaintiff, hereinafter made, sold and agreed to gather and deliver to plaintiff at the wharf-boat of — at N., Ohio, without delay, all of said crop of grapes in good order, estimated to contain — bushels of grapes, at the agreed price and value of — dollars per stand, each stand to contain — bushels.

Plaintiff further says that by the terms of said agreement he was to pay for said grapes as they were so delivered to him, and that under said agreement defendants did commence to gather and deliver said grapes to this plaintiff, and that he paid for the same as he agreed to do, and that the defendants continued to so deliver said grapes, until he delivered about twelve stands thereof and received from this plaintiff his pay therefor, but that defendants then and thereafter failed and refused to deliver the remainder of said grapes, although the plaintiff was ready to receive the same and pay for them upon delivery as he had agreed to do, and that, on the contrary, defendants gathered and sold the same to another, to the damage of this plaintiff in the sum of — dollars, for which he asks judgment.

NOTE.— From *Simmons v. Green*, 85 O. S. 104.

Sec. 452. Petition for failure to deliver goods sold as per contract.—

The plaintiffs, — Bros., say that they are a copartnership, unincorporated, formed for the purpose of and doing business in the state of Ohio; that the defendant F. J. D. was, at the times hereinafter mentioned, and has ever since been, doing business in C., Ohio, under the firm style of F. J. D. & Co.; that on or about, to wit, —, 18—, the defendant sold to the plaintiffs a large quantity of paper bags, in the quanti-

ties and at the respective prices [*set forth quantities and prices*]; that said sale amounted to — dollars; that said sale was made on the following terms of credit, to wit: [*set forth terms*]; that the plaintiffs then were and ever since have been engaged in business in C., Ohio; and that said paper bags were bought by them for shipment to said city and for use in their said business there, and for that market, and that all of these facts and purposes were known to the defendant at the time of said sale, and of the acts herein alleged; that defendant set apart said goods, and caused a large quantity thereof to be delivered at the depot of a common carrier for transportation to C. to the plaintiffs, and that on — —, 18—, he, without plaintiffs' consent, canceled the sale and disposed of said goods wrongfully, and in a manner to plaintiffs unknown, but to and for his own use and benefit; that at the time of said cancellation plaintiffs had sold and contracted to sell a large quantity of said bags at an advance on the said principal sum of — per cent.; and plaintiffs further say that they were unable to replace said purchase, and were unable to obtain like goods to substitute those bought of the defendant, and that on the day of sale of said goods by the defendant to the plaintiffs, as well as on the day of said cancellation of sale, such goods were of such a character that they could not be replaced nor substituted by any other goods, and hence had no regular market price or value, and that defendant was well aware on the day of sale both of their peculiar character as aforesaid, and of their not possessing a regular market price or value; and the plaintiffs further say that on the day when the defendant canceled the sale as aforesaid, the said bags purchased by plaintiffs were worth the sum of — dollars.

Plaintiffs further say that they have been at all times and are now ready to do and perform everything to be done by them in the carrying out of the sale, but that defendant, although often requested so to do, has refused to ship and complete the shipment of said goods to said plaintiffs at C., Ohio, and that by reason of the facts set forth herein the plaintiffs have suffered a loss of — dollars, which defendant refuses to pay.

Wherefore the plaintiffs pray judgment against defendant in the sum of — dollars, with interest from —, and costs.

NOTE.— Changed from *Diem v. Koblitz*, 49 O. S. 41. The petition in the case from which this form was taken set forth a copy of the bill of goods sold as an exhibit and referred to it to supply averments, which was not correct pleading, but no objections were made on that account. *Ante*, sec. 57.

Sec. 453. Defenses to actions on contracts — The answer.

A contract is always presumed to be made upon a valuable consideration, and a want thereof must be shown by the party

attacking it,¹ as want of consideration cannot be shown under a general denial.² But the defendant may always allege want or failure of consideration.³ It is a sound principle and a well-settled rule of law that a contract contrary to morals or public policy or forbidden by law will not be enforced.⁴ But it is held that where the consideration of a contract is partly legal and partly illegal and the same is capable of separation, the good may be separated and enforced.⁵ But where a contract is entire, and a part is illegal because it falls within the statute of frauds, the remainder cannot be enforced.⁶ As illegal consideration in whole or in part defeats a contract when inseparable, a debt which has its inception in illegality cannot be made valid by a new promise.⁷ A contract by which a voluntary association is formed for the purpose of controlling the manufacture and sale of an article of general use is against public policy and will not be upheld.⁸ While a party who has entered into a contract tainted with illegality may not seek affirmative relief, still he may plead the illegality as a defense even though he may be *in pari delicto*.⁹ And so long as the contract remains unexecuted a party may be relieved therefrom.¹⁰ So a verbal agreement to will property to another cannot be enforced unless something be done to take it out of the statute, as possession or part performance.¹¹ But acts of part performance, to relieve the contract from the statute, must of themselves be clearly referable to some contract between the parties relating to the same parties.¹²

¹ *Nelson v. White*, 61 Ind. 139; ⁸ *Central Ohio Salt Co. v. Guthrie*, 35 O. S. 666.

White v. Drake, 3 Abb. N. C. 134; ⁹ *Jacobs v. Mitchell*, 46 O. S. 606; *Smith v. Flack*, 95 Ind. 121; *Eldridge v. Mather*, 2 N. Y. 157; *Weaver v. Rowl v. Ragut*, 4 O. 400; *McQuaig v. Barden*, 49 N. Y. 286; *Dubois v. Rosecrans*, 36 O. S. 442; *Kahn v. Hermance*, 56 N. Y. 673; *Hammond v. Walton*, 46 O. S. 195-209.

v. Earle, 58 How. Pr. 426. ¹⁰ *Strait v. Hardware Co.*, 18 N. Y. S. 224.

² *Bingham v. Kimball*, 17 Ind. 396. ¹¹ *Hopple v. Hopple*, 3 O. C. C. 102; *Judy v. Louderman*, 48 O. S. 562; *Shahan v. Swan*, 48 O. S. 25. See

O. Code, sec. 5071. author's note, 32 C. L. J. 205-208;

⁴ *Spurgeon v. McElwaine*, 6 O. 442. *Lindsey v. Lynch*, 2 Sch. & Lefroy, 1;

⁵ *State v. Williams*, 29 O. S. 161. *Maddison v. Alderson*, L. R. 8 App.

See *ante*, sec. 445. *Cas. 467*; *Dale v. Hamilton*, 5 Hare, 369; *Van Dyke v. Vreeland*, 11 N. J. Eq. 370.

⁶ *Howard v. Brower*, 37 O. S. 402, 407; *Hopple v. Hopple*, 3 O. C. C. 106. See *ante*, sec. 445.

⁷ *Bick v. Seal*, 45 Mo. App. 475.

¹² *Shahan v. Swan*, *supra*.

Where parties have partly performed an illegal contract, a court will not lend its aid to enforce or rescind it, but will leave them where it found them.¹ The rule that relief will not be granted to one of the parties to an illegal contract is not applicable to a case where relief is sought against the act of an agent or trustee of one party,² but relief may be had by one party to an illegal unexecuted contract when it will prevent its execution, upon the principle of *locus penitentie*.³ Recovery may be had upon a contract for a breach thereof where the same was procured by fraud.⁴ An agreement not to make a defense to divorce proceedings cannot be enforced.⁵ Where illegality of a contract is relied upon as a defense, a statement of the facts upon which such illegality is founded should be fully set forth as it cannot be shown under a general denial.⁶ An objection that a contract is void because made on Sunday must be made by answer, not by demurrer.⁷ If a defendant desires to set up a counter-claim upon the ground that the plaintiff has not complied with the terms of the contract, the facts constituting such non-performance must be fully averred, and must be of such a nature as to warrant recovery against the plaintiff.⁸ A certain statement of facts may constitute a defense to an action on a contract and also a counter-claim, but in pleading the same they should be formally separated.⁹ An answer to an action for a breach of contract which sets up a contract different from that averred in the petition is immaterial, and will not controvert that set up by the plaintiff, which in the absence of a specific denial will be taken as

¹ Hooker v. De Palos, 28 O. S. 251; 16 O. 54; 6 O. 227; 4 O. 400.

² Hafer v. Railroad Co., 14 W. L. B. 72; Tenant v. Elliott, 1 B. & P. 3. See, also, L. R. 8 Ch. App. 149; Elerman v. Insurance Co., 35 O. S. 324; Wharton on Contracts, sec. 357.

³ Hafer v. Railroad Co., 14 W. L. B. 68, 72; Spring Co. v. Knowlton, 108 U. S. 60; Hooker v. De Palos, 2 C. S. C. R. 370.

⁴ Colbert v. Shepherd, 16 S. E. Rep. 246 (Va., 1892).

⁵ Stoutenburg v. Lybrand, 18 O. S. 228.

⁶ Commissioners v. Noyes, 35 O. S. 207; 18 O. S. 853; 31 O. S. 555; 34 O. S. 467; 31 Cal. 271; Stafford Paving Co. v. Monheimer, 41 N. Y. Super. 184; Mathews v. Leaman, 24 O. S. 621; Bliss on Code Pldg., sec. 320.

⁷ West. Union Tel. Co. v. Eskridge, 33 N. E. Rep. 238 (Ind., 1893).

⁸ Brandham v. Johnson, 62 Ind. 259. See Parsons v. Sutton, 66 N. Y. 92. See *ante*, secs. 80, 81.

⁹ Lancaster, etc. v. Colgate, 12 O. S. 344. See *ante*, secs. 20, 81.

true.¹ If in such a case, however, the defendant denies the contract alleged by plaintiff, both instruments must be submitted to the jury.² Where a contract has been modified and the answer admits non-performance thereunder, evidence cannot be admitted showing an extension of time or a change in the place of performance.³ In an action to recover a debt which a person agreed with a third party to pay, the defendant may set up any defense which he could have made as against the contracting party.⁴ In an action upon a specialty by the payee, an answer by the maker setting up want of consideration constitutes a good defense.⁵ If a person has not been guilty of negligence he may rescind a contract entered into by reason of a material mistake as soon as discovered.⁶

Sec. 454. Tender and offer in actions on contracts.—In an action on a contract for the payment of money, the defendant may answer that he did tender payment of money due thereon, at any time before the commencement of the action. Or he may, at any time before trial, pay to the clerk the money so tendered, in which case the plaintiff is not entitled to judgment for more than the amount so tendered.⁷ A formal tender is not required where it is certain that it will not be received.⁸ If a contract calls for the payment of any article or thing other than money, or for the performance of any work or labor, the defendant may answer that he did tender payment or performance of the contract at the time and place provided; in which case, if the finding be in his favor as to such tender, the plaintiff will not be entitled to recover interest or costs.⁹ Where affirmative relief is sought against a usurious contract, either by original or cross petition, a tender of the amount due, exclusive of usury, must be made.¹⁰

¹ *Simmons v. Green*, 35 O. S. 104; 257-65; *Railway v. Oswald*, 18 Kans. Marx v. Gross, 22 N. Y. Supp. 393. 836.

² *Wagener v. Butler*, 22 N. Y. 692.

⁶ *Byers v. Chapin*, 28 O. S. 300.

³ *Ryan v. Rogers*, 93 Cal. 349; 31 Pac. Rep. 344 (1892).

⁷ O. Code, sec. 5137.

⁴ *Trimble v. Strother*, 25 O. S. 373.

⁸ *Isham v. Greenham*, 1 Handy, 357.

⁵ *Louderman v. Judy*, 2 O. C. C. 251-5; *Richardson v. Bates*, 8 O. S.

⁹ O. Code, sec. 5138; *Huntington v. Ziegler*, 2 O. S. 10.

¹⁰ *Bank v. Bell*, 14 O. S. 200.

Sec. 455. Answer that goods were not delivered because of insolvency of vendee after making contract.—

Defendant admits that he is doing business in the said city of — under the firm name of F. J. D. & Co. He admits that on or about —, 18—, he made an agreement to sell plaintiffs a quantity of paper bags.

He says that the terms of said sale were that plaintiffs were to deliver to him their negotiable paper for the purchase-price, payable in equal instalments to the order of defendant in thirty, sixty and ninety days from date.

He says that he sent a part of said goods, in amount about two car-loads, called for by said agreement of sale, to the depot of the O., C., C. & L. R. R. Co., at C., Ohio, when he was informed and so charges that plaintiffs' commercial paper had gone to protest in said city of C., and they were insolvent; that he thereupon disposed of said goods to the firm of H. & B., in C., at seventy per cent. discount on the list price, delivered at C.; that said goods were damaged by smoke and fire, and consisted of square bags. And that after he had disposed, at the price aforesaid, in the manner aforesaid, of the quantity of goods covered by the agreement of sale with plaintiffs, he still had a large quantity of similar goods left in store for sale.

Defendant denies each and every allegation contained in said petition and not herein admitted to be true.

Wherefore he prays to be hence dismissed with costs.

NOTE.—From *Diem v. Koblitz*, 49 O. S. 41, in which it was held that the seller is not bound to deliver goods if the buyer be insolvent.

CHAPTER 29.

CONTRIBUTION.

Sec. 456. Parties in actions for contribution.	Sec. 459. Petition to compel contribution by one of two or more judgment debtors.
457. Nature of remedy and principles of pleading.	460. Petition by one who has been compelled to pay a judgment—Short form.
458. Petition for contribution in paying note.	461. Defenses to actions for contribution.

Sec. 456. Parties in actions for contribution.— It is essential that all who are liable to contribute towards the liquidation of a common burden should be made parties to an action for contribution, so that the amount required of them respectively may be adjusted in one action.¹ If any are deceased their personal representative should be made a party.² It is not necessary, however, to make a principal or co-surety who is insolvent a party;³ nor a surety who is within the jurisdiction of the court.⁴ Where more than one surety pays a debt jointly, they may join in an action for contribution against those who have failed to pay their proportionate share;⁵ and a surety upon the bond of an officer who has been compelled to pay something on account of a default of such officer may join his co-sureties in an action against the principal to compel them to contribute their proportionate share, or he may prosecute separate actions against each one;⁶ and a devisee and an executor may also be joined in one action upon the bond of a deceased surety.⁷ In actions by a surety against a co-surety to establish a trust, and to compel the latter to reimburse out of collaterals in his hands, the

¹ Carr v. Waldron, 44 Mo. 398;
Moore v. Moberly, 7 B. Mon. 299;
Pomeroy's R. & R., sec. 885.

² Id.; Dussol v. Bruguere, 50 Cal.
456.

³ Johnson v. Vaughn, 65 Ill. 425.
554

⁴ Jones v. Blanton, 6 Ired. Eq. 115.
⁵ Fletcher v. Jackson, 23 Vt. 581,
593.

⁶ Cunent v. Thompson, 2 C. S. C. R.
54 (Taft, J., 1870).

⁷ Shields v. Odell, 27 O. S. 393.

person to whom payment was made is not a necessary party to the action.¹

Sec. 457. Remedy and principles of pleading.—The remedy of contribution is founded upon the maxim that equality is equity, and therefore is governed by equitable rather than legal principles, as if in the nature of contract. It is an equitable obligation from which the law implies a contract that those who have entered into or assumed a common obligation shall, when the exigencies occur, bear that common burden equally; and in the absence of facts or circumstances which render the equity otherwise than equal, there being no express agreement to the contrary, equity will so compel contribution that the common burden shall be equally borne.² It is now regarded as an equitable action rather than a legal one as upon an implied contract. As between sureties there is an equity which springs up at the time the relationship is entered into, and ripens into a cause of action whenever one of them is compelled to pay more than his share of the common obligation. Equity does not recognize the fiction of an implied promise as did the common law, but equalizes the burden because of the moral obligation imposed.³ This equitable right becomes a vested one, which cannot be taken away by the creditor, principal, death of the party, or by the statute of limitations.⁴ As already stated, before this remedy can be pursued it is essential that all parties concerned be equally bound.⁵ It must also appear that the one invoking the remedy has paid the debt,⁶ a *prima facie* case being established where it is made to appear that one of two joint debtors

¹ *Rosenthal v. Sutton*, 31 O. S. 406 (1877). See *Bulkeley v. House*, 26 Atl. Rep. 352 (Conn., 1893).

² *Railroad Co. v. Walker*, 45 O. S. 577; *Hinckley v. Kreitz*, 58 N. Y. 583; *Sayles v. Sims*, 73 N. Y. 551; *Camp v. Bostwick*, 20 O. S. 337; *McCrary v. Parks*, 18 O. S. 1; *Russell v. Failor*, 1 O. S. 327; *Beach's Eq.*, sec. 823; 6 Paige, 32; 2 Neb. 268; 2 *Wait's A. & D.*, p. 288; *Bishop on Contracts*, sec. 238.

³ *Camp v. Bostwick*, 20 O. S. 337; *Koelch v. Mixer*, 52 O. S. 212.

⁴ *Camp v. Bostwick*, *supra*, and cases cited in last note; 4 Gratt. 268.

⁴ *Camp v. Bostwick*, 20 O. S. 347, citing 11 N. H. 431; 4 Gratt. 387; 1 Met. 387; 17 Mass. 464; 16 Ala. 465. It has been held in a case earlier than *Camp v. Bostwick*, just cited, that an action against a party liable to contribute is limited by statute to six years. *Neilston v. Fry*, 16 O. S. 552 (1866).

⁵ *Hinckley v. Kreitz*, 58 N. Y. 583; *Sayles v. Sims*, 73 N. Y. 551.

⁶ *Wood v. Leland*, 1 Met. 387.

has paid more than his proportionate share.¹ The payment of a debt purely personal cannot of course be enforced upon others, especially if the grounds rest upon the moral turpitude of the plaintiff.² The petition for contribution should contain a complete statement of the facts necessary to establish the right thereto.³ In earlier cases it has been held to be an essential prerequisite to an action for contribution that notice of payment of a debt by a surety be given, or a demand upon the co-surety be made.⁴ These decisions, however, were made before the common-law fiction in reference to this action was abandoned, and while the remedy was not regarded as it now is. The more sensible rule, and the one adopted by courts generally, is that a previous notice of payment and demand for contribution is not required; that in any event the want of notice can only affect the question of cost. The co-sureties might with some reason say that, if they had known of the default of the principal and been called upon, they would have contributed their share without incurring the costs of an action.⁵

This remedy may be invoked in favor of a stockholder in a corporation against whom the statutory liability is sought to be enforced, giving him the right to require that his co-stockholders be made parties, that they may be compelled to contribute in proportion to their respective shares of stock. This right grows out of the organic relations existing between them;⁶ and when this liability has been enforced against a portion, recovery *pro rata* may be had from the remainder.⁷ But a member of an insolvent corporation who voluntarily pays the debts of such corporation cannot recover his *pro rata* share of such indebtedness from another member who was at the time of such payment solvent and within the same jurisdiction;⁸ as payment, to entitle one to contribution, must be

¹ Gastner v. Waggoner, 26 O. S. 450;
Wills v. Miller, 66 N. Y. 255; New-
come v. Gibson, 66 N. Y. 258.

² McCrory v. Parks, 18 O. S. 1, 8.

³ Van Demark v. Van Demark, 18
How. Pr. 372; Bachelder v. Fiske, 17
Mass. 464.

⁴ Carpenter v. Kelly, 9 O. 107 (1898);
Sherron v. Woodward, 4 Dev. 360-8;
Williams v. Williams, 5 O. 446.

⁵ Neilston v. Fry, 16 O. S. 552;
Parkham v. Green, 64 N. C. 436;
Chaffee v. Jones, 19 Pick. 260; Woods
v. Perry, 9 Ia. 479; Howe Machine
Co. v. Farrington, 82 N. Y. 122.

⁶ Umsted v. Buskirk, 17 O. S. 113.

⁷ Stewart v. Lay, 45 Ia. 604;

O'Reilly v. Bard, 105 Pa. St. 569.

⁸ Burr v. Bates, 3 O. C. C. 1.

under a legal compulsion.¹ Nor can a surety who has voluntarily paid a void note maintain an action against his co-surety for contribution.² Nor can the maker of an accommodation note altered after its delivery, who has voluntarily paid the same, recover against another maker thereof who has not consented to or ratified such alteration.³

Where an acceptor of an accommodation bill of exchange has been compelled to pay the same, there can be no implied obligation on the part of the drawer to reimburse him, as in the absence of any understanding to the contrary they are not co-sureties for the payee and therefore not liable to contribution.⁴ A surety for a partnership who has paid the debt may proceed against the estate of a deceased partner without first prosecuting a suit against the survivor.⁵ The rule that no contribution lies between trespassers applies only to cases where those claiming contribution have knowingly or wantonly committed a wrong,⁶ and as a general rule there can be no right of contribution between joint tort-feasors.⁷ But this rule is not of universal application, and is limited to those engaged in doing a wrong knowingly and wantonly, and has been held not applicable to a case where several sureties have directed an officer to make a levy, which is made upon the wrong goods, and the true owner recovers the value of same from the officer and those directing the levy.⁸ A guarantor may pay the debt upon maturity and enforce the principal obligation, but he cannot by notice impose the duty of active diligence on the creditor.⁹ Nor will payment by one of two joint obligors of an amount in excess of their proportion of a debt which is barred by the statute of limitations entitle him to contribution against his co-obligor.¹⁰ The obligation of one of two co-sureties is to pay the whole debt; and if that is done by one, he may compel his co-surety to contribute any

¹ *Id.*; 1 Parsons on Contracts (7th ed.), p. 82; 2 Wharton on Contracts, secs. 765-837. See, also, Curtis v. Parks, 55 Cal. 106; Andrews v. Callendar, 18 Pick. 484; Lucas v. Insurance Co., 6 Cowen, 635-8.

² Russell v. Failor, 1 O. S. 327.

³ Davis v. Bauer, 41 O. S. 257.

⁴ Barnett v. Young, 29 O. S. 7.

⁵ Horsey v. Heath, 5 O. 354.

⁶ Atcheson v. Miller, 2 O. S. 203.

⁷ Betts v. Gibbins, 2 A. & E. 57; 2 Addison on Torts, 1197; Bliss on Code Pldg., sec. 89.

⁸ Atcheson v. Miller, 2 O. S. 203.

⁹ Newcome v. Hale, 90 N. Y. 327.

¹⁰ Turner v. Thom, 17 S. E. Rep. 333 (Va., 1893).

portion in excess of his moiety.¹ But where a surety has taken an indemnity, he holds the same as a trustee for his co-surety, and is to be protected like a trustee when he acts with integrity and ordinary prudence. When such has been his course, any change in the indemnity made in good faith will not relieve his co-surety from contribution, although it might be otherwise if there has been a loss.² A joint duty is imposed upon railroad companies whose roads cross at grade to keep the crossing in repair and maintain watchmen thereat. When, therefore, one company performs the whole duty in this respect and discharges the entire obligation resting upon all, it is entitled to reimbursement from the remainder for their proportionate share of the burden borne by the former. In such a case the duty of contribution arises by operation of law.³ An action for contribution is an action for money and hence not appealable.⁴

Sec. 458. Petition for contribution in paying note.—

On the — day of —, 18—, one C. D., with the plaintiff and defendant as sureties, made and delivered to A. B. a promissory note dated —, 18—, for the sum of \$—, payable to the said A. R. in — months after date, upon which plaintiff was a surety.

That when said note became due the said C. D., principal debtor, being wholly insolvent, the plaintiff as one of the sureties, by reason of said C. D.'s insolvency and inability to pay, was compelled to and did pay the whole amount of said note, amounting to the sum of \$—.

On the — day of —, 18—, the plaintiff requested the defendant to pay the sum of \$— so paid by this plaintiff upon said note as his contributive share, which he wholly failed and refused to pay.

Defendant is therefore indebted to plaintiff in the sum of \$— as his contributive share of the note so paid by plaintiff.

That no part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—, for which he asks judgment.

NOTE.— Where a person signing a note adds to his signature the words "security to above," the first sureties cannot compel contribution, unless such person intended to become co-surety. *Thompson v. Sanders*, 4 Dev. & Bat. 404; *Oldham v. Broom*, 28 O. S. 41; *Baldwin v. Fleming*, 90 Ind. 177. A surety has no greater rights against a co-surety than the creditor has against them both. *Russell v. Failor*, 1 O. S. 827.

¹ *Morgan v. Smith*, 70 N. Y. 537; ³ *Railroad Co. v. Walker*, 45 O. S. Garfield v. Foskett, 57 Vt. 292; New- 577.

comb v. Gibson, 127 Mass. 396.

⁴ *Gunsaulus v. Petit*, 46 O. S. 37.

² *Carpenter v. Kelly*, 9 O. 107.

Sec. 459. Petition to compel contribution by one of two or more judgment debtors.—

On the — day of —, 18—, a judgment was rendered in the — court of common pleas of — county, Ohio, in favor of A. B. against E. F., this plaintiff, and defendant C. D., for the sum of \$—.

That execution against the property of said defendants was thereupon issued to the sheriff of said county of —, and was by him levied upon certain premises situated in the county of —, and state of Ohio, which said premises were owned solely by this plaintiff and no part thereof were owned by the defendant C. D.

That said property was sold on the — day of —, 18—, by said sheriff according to law, and the whole [*or*, a portion] of said judgment was, by said sale, collected out of the said plaintiff's premises, the amount so collected including interest and costs accrued upon said judgment and execution in the sum of \$—.

That said plaintiff and his said property was liable only for one-half of said judgment, and said defendant C. D. was liable for the remaining one-half part thereof.

That said defendant C. D. is [*or*, was, at or since the time of the recovery of said judgment] the owner of certain real estate situated in the county of —, Ohio, and described as follows: [*Description.*] That said judgment so as aforesaid rendered against this plaintiff and said defendant, and which this plaintiff was compelled to pay as aforesaid, is a lien upon said real estate, and is liable to satisfy the said judgment.

Wherefore the said plaintiff asks judgment, that said premises of the said C. D. may contribute, in the manner prescribed by law, the one-half part of said amount collected out of the real property of said plaintiff as aforesaid, to wit, the sum of — dollars, with interest thereupon from the — day of —, 18—, and that plaintiff may have judgment therefor, and for the enforcement of the said contribution; and that the court will permit the plaintiff to use the said original judgment, and to collect, by an execution issued thereupon, out of any real property subject to any lien thereof, the sum which ought to be contributed by that property, and that the plaintiff may have such other or further relief in the premises as may be just and proper, together with the costs of this action.

NOTE.— One of several co-sureties who pays a joint judgment may bring an action against his co-sureties to be subrogated, even though the judgment be extinguished. *Neilston v. Fry*, 16 O. S. 552. A surety on an attachment undertaking is not a co-surety with an additional surety on a *supersedeas* bond in same cause, and no right of contribution arises between them. *Hartwell v. Smith*, 15 O. S. 200; *Knox v. Vallandigham*, 15 Smedes & M. 526.

Sec. 460. Petition by one who has been compelled to pay a judgment — Short form.—

That on the — day of —, 18—, J. D. S., R. M. and D. H. recovered a judgment in the court of common pleas of — county, in the state of Ohio, against the plaintiff and the defendant R. G. for the sum of — dollars, debt and costs of suit, amounting to — dollars. That on or about the — day of —, 18—, the plaintiff was compelled to and did pay off and discharge said judgment and costs in full, whereby the defendant R. G. became indebted to the plaintiff in the sum of — dollars with interest from —, as his proportionate share of said judgment, no part of which said sum has been paid by said R. G. to this plaintiff.

Plaintiff therefore prays judgment against the said defendant, etc.

Sec. 461. Defenses in action for contribution.—As between joint creditors there is no presumption that either is primarily liable. Hence, if that be claimed, or if there be no equitable obligation to pay proportionate shares, the facts which rebut the presumed equity must be set up by way of defense and not negatived in the petition.¹ A co-surety is not discharged from an entire debt by an extension granted to one surety, but only from such portion as the surety to whom the extension is granted was bound to pay.² As between wrong-doers there can be no contribution; and hence, where a landlord has allowed his tenant to engage in the sale of intoxicating liquors upon his premises in violation of law, by reason whereof an injury results to another, the landlord cannot compel the tenant to contribute any portion of a judgment which the landlord has been compelled to pay by reason of the insolvency of the tenant.³

¹ Gastner v. Waggoner, 26 O. S. 450. ² Zeigler v. Rommel, 30 W. L. R.

³ Ide v. Churchill, 14 O. S. 872; 115.

Klingensmith v. Same, 81 Pa. St. 460;

Waggener v. Dyer, 11 Leigh, 384.

CHAPTER 30.

CONVERSION.

Sec. 462. Conversion defined, and when the action lies.	Sec. 471. Petition by guardian for conversion of timber on land of minor by railroad company.
463. Parties.	
464. Petition shall contain what.	472. Petition for conversion of property by a railroad company — which operates an express company.
465. Petition shall contain what, as to demand and refusal.	473. Petition for conversion of goods delivered to another by virtue of a bill of sale to be sold and applied in payment of claims.
466. Petition for damages for conversion.	474. Defenses to actions for conversion.
467. Petition for conversion of oil.	
468. Petition by assignee to whom goods were assigned after conversion.	
469. Petition for conversion of note or bond.	
470. Petition where demand must be alleged.	

Sec. 462. Conversion defined, and when the action lies.— One who detains the goods of another without cause, and assumes the right to dispose of them, is guilty of a conversion of the same to his own use. A frivolous excuse will amount to a refusal, and demand and refusal are *prima facie* evidence of the conversion of the goods by the one so refusing.¹ When an owner of property has sustained damages by reason of an unauthorized or unlawful interference therewith, he may maintain an action for conversion against the wrong-doer.² If possession be gained by trespass, the plaintiff, by bringing his action in this form, waives his right to damages for the taking, and is confined to the injury resulting from the conversion; and if the facts show a conversion, relief may be had even though it be for possession.³ A corporation which refuses

¹ Charge in *Canfield v. Clark*, unreported case, Supreme Court, No. 1778; *Railroad Co. v. O'Donald*, 49 O. S. 495. See, also, 86 N. H. 311.

² *Gillet v. Roberts*, 57 N. Y. 28; *Pease v. Smith*, 61 N. Y. 477; *Boyce v. Brockway*, 81 N. Y. 490.

³ *Morish v. Mountain*, 22 Minn. 564; *Washburn v. Mendenhall*, 21 Minn. 332.

to transfer stock on its books because the person demanding the same is not entitled thereto is not liable for a conversion thereof.¹ But an action may be maintained against a corporation for a conversion of its own stock.² Although a common carrier, as a rule, is not an insurer of property when it has done all in its power to deliver the same and is unable so to do, and the property under such circumstances is in its hands merely as a depository,³ yet it may be liable for conversion if it carries goods to a place other than that to which they were consigned;⁴ and if it injures property to a greater extent than its charges for freight, and refuses to deliver the same upon demand made by the consignee without payment of charges, it is also guilty of conversion.⁵ An express company is bound to deliver property intrusted to its care with all reasonable dispatch, and is held to this obligation with great strictness.⁶ If property is purchased from one supposed to be an agent who is not, and is again sold to a third person, the first purchaser is liable for conversion.⁷ Where petroleum has been stored with a storage company, such company will be liable for a conversion if it refuses to deliver the oil on demand. If it is so stipulated by contract, a counter-claim for evaporation and charges may be allowed, which cannot be defeated by bringing an action in trover.⁸ Where personal property has been seized by a sheriff under writs of attachment, the sheriff and attaching creditors may, by virtue of their right under such proceeding, maintain a general action to recover damages for the subsequent conversion or detention by a stranger.⁹ The removal of fixtures from premises does not constitute conversion.¹⁰

Sec. 463. Parties.—An administrator or executor may maintain an action for conversion of property of his decedent converted during his-life time;¹¹ and it has been held that

¹ *Franklin Bank v. Bank*, 36 O. S. 350; *Bank v. Bank*, 37 O. S. 208. But see *Railroad Co. v. Rosin*, 16 W. L. B. 423.

² *Condouris v. Tobacco Co.*, 22 N. Y. S. 695.

³ *Railroad Co. v. O'Donald*, 49 O. S. 496.

⁴ *Railroad Co. v. O'Donald*, *supra*.

⁵ *Miami Powder Co. v. Railroad Co.*, 38 S. C. 78; s. c., 16 S. E. Rep. 339.

⁶ *Railroad Co. v. O'Donald*, *supra*.

⁷ *Hamet v. Letcher*, 37 O. S. 356.

⁸ *Cow Run v. Lehmer*, 41 O. S. 384.

⁹ *Turner v. Marienthal*, 17 O. S. 184.

¹⁰ *Rowland v. Sprauls*, 21 N. Y. S. 895.

¹¹ *Towle v. Lovet*, 6 Mass. 394; *Man-*

an administrator may sue in his own name, without alleging his representative capacity, for a conversion of goods after the death of his intestate;¹ but if the conversion took place during the life-time of the decedent, representative character must be averred.² A debtor sending money to a creditor by an express company may, if the same is lost, sue the company therefor.³ The action may be maintained by one who has possession by virtue of a bill of lading against another who does not show a better title.⁴ An action for the non-delivery of property may be brought either by the consignor or consignee under a special agreement.⁵ A lessee is the proper person to bring the action for a conversion committed while such lessee is in possession;⁶ and so with a bailee for goods the subject of bailment.⁷

Sec. 464. Petition shall contain what.—Some of the old requisites of the declaration are preserved in this action. The petition should unequivocally state that the plaintiff is the owner of the property, although a general allegation of ownership has been considered sufficient.⁸ It must be specifically averred, however, that the plaintiff was the owner of the property at the time the conversion took place.⁹ The origin of the plaintiff's right to possession or the derivation or precise nature of his title need not be alleged;¹⁰ nor is it essential that the facts constituting ownership be stated, as an allegation that the plaintiff was the owner

well v. Briggs, 17 Vt. 176; Eubanks v. Debb, 4 Ark. 178.

¹ Munch v. Williamson, 24 Cal. 176; Sheldon v. Hoy, 11 How. Pr. 11. See 1 Root, 289.

² Sheldon v. Hoy, *supra*.

³ Bernstine v. Express Co., 40 O. S. 451.

⁴ Adams v. O'Connor, 100 Mass. 515.

⁵ Stafford v. Walter, 67 Ill. 83.

⁶ Triscoy v. Orr, 49 Cal. 612.

⁷ Mizner v. Frazier, 40 Mich. 592.

⁸ Van Santvoord's Pldg., pp. 213, 274; Wright v. Field, 64 How. Pr. 117 (1892); Binnian v. Baker, 32 Pac. Rep. 108 (Wash., 1893); Heine v. Ander-

son, 3 Duer, 318; Anderson v. Bowles, 44 Ark. 108 (1884). An allegation "that the plaintiff was lawfully possessed" (or "was entitled to the immediate possession of the goods as his property") is considered a sufficient statement. 1 Abbott's Forms and Pleadings, 457.

⁹ Smith v. Force, 31 Minn. 119; Swope v. Paul, 4 Ind. App. 468 (1891); Picquet v. McKay, 2 Blackf. 465; Redman v. Gould, 7 Blackf. 361.

¹⁰ Swope v. Paul, *supra*; Harvey v. McAdams, 32 Mich. 472 (1875).

at the time of the conversion will be sufficient.¹ An allegation that a defendant has converted property to his own use is one of fact and not of law.²

As forms are not always followed, there necessarily have been numerous adjudications upon the various forms of charging conversion. Merely alleging an unlawful conversion,³ or that the defendant took and carried away goods,⁴ has been held sufficient. And so charging a railway company with unlawfully and wrongfully taking, converting and appropriating property to its own use, by hauling it away and using it in its road, states a good cause of action;⁵ and so with an allegation that the plaintiff is the owner of the property, with a description and statement as to the value thereof, and that the defendant wrongfully took and converted it to its own use.⁶ In an action for conversion of stocks it is not necessary to allege that they have been indorsed so as to enable the defendant to transfer the same; nor is it essential to show how or by what means the conversion was accomplished.⁷ A petition alleging that plaintiff is the owner of certain woodland from which there has been cut and removed certain timber by a person unknown and without authority, which has been taken and used by a railroad company, states a good cause of action for conversion.⁸ An allegation that a defendant has collected and converted money belonging to the plaintiff to his own use, and that he fails and refuses to pay the same over, is a sufficient allegation to show conversion.⁹ But where one person sells property for another, and fails to properly apply the proceeds, there is no conversion of property,

¹ *Wright v. Field*, 64 How. Pr. 117; *Greencastle v. Martin*, 74 Ind. 453; *Swift v. James*, 50 Wis. 540 (1880); *Green v. Palmer*, 15 Cal. 411; *Berney v. Drexel*, 63 How. Pr. 471; *Harvey v. McAdams*, *supra*; *Jackson v. Lumber Co.*, 45 Wis. 120 (1878).

² *Duggan v. Wright*, 157 Mass. 228; 32 N. E. Rep. 159 (1892).

³ *Johnson v. Lumber Co.*, 45 Wis. 119; *Edwards v. Bank*, 59 Cal. 136; *Decker v. Mathews*, 12 N. Y. 813.

⁴ *Hutchins v. Castle*, 48 Cal. 152.

⁵ *Railway Co. v. Balch*, 105 Ind. 93 (1885).

⁶ *Robinson v. Plow Co.*, 31 Pac. Rep. 988 (Okla., 1893); *Railroad Co. v. O'Donnell*, 49 O. S. 439.

⁷ *Smith v. Thompson*, 94 Mich. 381; 54 N. W. Rep. 168 (1892); *Deebe v. Knapp*, 28 Mich. 53; *Hutchinson v. Whitmore*, 90 Mich. 255; 51 N. W. Rep. 451.

⁸ *Railroad Co. v. Hutchins*, 37 O. S. 282.

⁹ *Sloan v. Railroad Co.*, 33 N. E. Rep. 997 (Ind., 1893).

his liability resting upon the conversion of the proceeds.¹ Some authorities hold it to be not essential to the recovery of damages for conversion that the petition contain an averment that the plaintiff is entitled to possession of the property,² while other courts hold that either possession, right of possession or a demand of possession must be alleged.³ Ordinarily descriptions of quantity are liberally construed, but this is not true where it is entirely uncertain; hence it is essential that the property be described with reasonable certainty, though not so accurately as in detinue.⁵ It has generally been considered unnecessary to allege the value of the property, upon the theory that the same can not be properly put in issue.⁶

Sec. 465. Petition shall contain what, as to demand and refusal.—The prevailing doctrine is that, where there has been an actual conversion, demand and refusal need not be averred.⁷ Where the original possession is lawful, a demand and refusal may be evidence of conversion; but where the original possession is unlawful, the original taking constitutes a conversion and hence no demand is necessary.⁸ The sole object of a demand is to turn an otherwise lawful possession into an unlawful one by reason of such refusal, and thus supply evidence of a conversion.⁹ The cause of action is complete immediately upon actual conversion without demand;¹⁰

¹ Bixell v. Bixell, 107 Ind. 584.

² Baals v. Stewart, 109 Ind. 371.

³ Binnian v. Baker, 32 Pac. Rep. 1008 (Wash., 1893); Parker v. Bank, 54 N. W. Rep. 313 (N. D., 1892); Anderson v. Bowles, 44 Ark. 108; Swope v. Paul, 4 Ill. App. 463.

⁵ Edgerly v. Emerson, 23 N. H. 555; Hall v. Burgess, 5 Gray, 12.

⁶ Connors v. Meir, 2 E. D. Smith, 314 (1854). See, also, Jonas v. Rahilly, 16 Minn. 320; Jefferson v. Hale, 31 Ark. 286; 2 Wash. (Va.) 192.

⁷ Berney v. Drexel, 63 How. Pr.

471-75 (1882); Koehring v. Aultman, 84 N. E. Rep. 80 (Ind.); Proctor v. Cole, 66 Ind. 576 (1879); Railroad Co. v. O'Donnell, 49 O. S. 489; Bunger v. Roddy, 70 Ind. 26; Hon v. Hon, 70 Ind. 137; Terrell v. Butterfield, 92 Ind. 1.

⁸ Berney v. Drexel, *supra*; Pease v. Smith, 61 N. Y. 477; Pugh v. Callo-way, 10 O. S. 488, opinion on pp. 493, 494.

⁹ Pease v. Smith, *supra*; Vincent v. Conkling, 1 E. D. Smith, 203; Glassner v. Wheaton, 2 E. D. Smith, 352; Munger v. Hess, 28 Barb. 75.

¹⁰ Brewster v. Silliman, 38 N. Y. 423;

nor is it necessary where a *bona fide* purchaser has sold and delivered goods,¹ nor of a constable where he has seized the goods of a wrong person,² nor where money has been deposited with another.³ It must be made, however, where a party has received property in good faith, ignorant of the want of title in the person from whom he received it;⁴ and it should be made where there is a bailment, in order to terminate the same and thus give rise to a cause of action, unless there has been some wrongful conversion or negligence, in which case it is unnecessary.⁵ And so where property came into the hands of a person from a wrong-doer;⁶ or while it is in the hands of the assignee for the benefit of creditors;⁷ or where the property is in a warehouse, demand should be made on the owner thereof.⁸

Sec. 466. Petition for damages for conversion.--

Plaintiff says that at the time hereinafter stated he was the owner of and entitled to the immediate possession of the following described goods and chattels, the property of the plaintiff, to wit:

The undivided one-fourth interest and share in the shock in thirty-six acres of wheat, being the field east of W. and B. turnpike, and also the field west of the C., Mt. V. & C. railroad next to the lane, being upon the farm of the defendant in B., F. county Ohio, which was of the value of — dollars.

That on the — day of —, 18—, or about that time, the defendant, then and there obtaining the possession of said goods and chattels, unlawfully converted and disposed of the same to his own use, to the plaintiff's damage in the sum of — dollars, for which he asks judgment.

NOTE.—From *Huffman v. Wood*, Supreme Court, unreported, No. 1186. As to necessity of demand, see *ante*, sec. 465; *Cobbey on Replevin*, sec. 447; *Kennett v. Johnson*, 2 J. J. Marsh. 84. Immaterial if demand be not made

Hanmer v. Willis, 17 Wend. 91; ² *Thompson v. Vrooman*, 21 N. Y. S. 179.
Otis v. Jones, 21 Wend. 394; *Deering v. Austin*, 30 Vt. 380; *Wooster v. Sherwood*, 25 N. Y. 278; *Gillet v. Roberts*, 57 N. Y. 28; *Koehring v. Aultman*, 34 N. E. Rep. 30 (Ind.); *Hon v. Hon*, 70 Ind. 185-187; *Bunger v. Roddy*, 70 Ind. 26.

¹ *Pease v. Smith*, 61 N. Y. 477.

² *Black v. Clasp*, 32 Pac. Rep. 564 (Cal.); *Boulware v. Craddock*, 30 Cal. 190; *Murfree on Sheriffs*, secs. 270, 270a.

⁴ *Plano Mfg. Co. v. Pac. El. Co.*, 53 N. W. Rep. 202 (Minn., 1892).

⁵ *Bassett v. Baker*, Wright, 337; *McLain v. Huffman*, 30 Ark. 428; 27 Mo. 549. See *Wade v. Carson*, 13 Nev. 49; *Levi v. Silverstein*, 22 La. Ann. 363.

⁶ *Fuller v. Lewis*, 3 Abb. Pr. 383.

⁷ *Goodwin v. Wertheimer*, 99 N. Y. 149.

⁸ *Baumann v. Jefferson*, 23 N. Y. S. 635.

upon officer until after expiration of his term. *Brobst v. Skillen*, 16 O. S. 882. When conversion is only technical, and property is in the same condition, plaintiff may be compelled to take it back in mitigation of damages. *Churchill v. Welch*, 47 Wis. 89; *Cook v. Loomis*, 26 Conn. 483; *Tracy v. Good*, 1 Clark (Pa.), 472. See *Brewster v. Silliman*, 88 N. Y. 428. An administrator may sue for property converted before his appointment. *Jahns v. Nolting*, 29 Cal. 507. The measure of damages is the value of the property at the time of conversion with interest. *Railway v. Hutchins*, 82 O. S. 571; *Jefferson v. Hale*, 81 Ark. 286; *Coffey v. Bank*, 46 Mo. 140; *Shepard v. Pratt*, 16 Kan. 209. See 17 Pick. 1; 88 Ma. 174; 80 Vt. 307; 23 Mo. 394; *Railway Co. v. Hutchins*, 87 O. S. 382. Recovery cannot be had for the enhanced value of property by labor of the wrong-doer. *Railway Co. v. Hutchins*, *supra*; *Hyde v. Corkson*, 21 Barb. 92; *Silsbury v. McCoon*, 4 Denio, 337; *Single v. Schneider*, 80 Wis. 570. The rule of damages is said to be determined by the animus of the wrong-doer. *Heard v. James*, 49 Miss. 236; *Herdie v. Young*, 55 Pa. St. 176; *Coleman's Appeal*, 63 Pa. St. 252-278. Expenses incurred in an action of detinue cannot be included in damages. *Ross v. Malone*, 12 So. Rep. 183 (Ala., 1898).

Sec. 467. Petition for conversion of oil.—

The said plaintiff J. D. L. complains of the said defendant the C. R. T. Co. for that on the — day of —, 18—, the said plaintiff was the owner of and entitled to the immediate possession of the following described goods and chattels, to wit, — barrels of crude petroleum of the value of — dollars; that on the — day of —, 18—, said defendant, having obtained and then being in possession of said goods and chattels and contriving to injure the said plaintiff, did wrongfully and unlawfully convert and dispose of the same to each of the said defendant's own use and benefit, to the damage of said plaintiff in the sum of — dollars.

Wherefore the said plaintiff prays judgment against said defendant for the said sum of — dollars, his damages as aforesaid sustained.

NOTE.—From *Cow Run Co. v. Lehmer*, 41 O. S. 384.

Sec. 468. Petition by assignee to whom goods were assigned after conversion.—

That at the time hereinafter mentioned one O. D. was the owner and lawfully in possession of the following described goods and chattels: [*Describe them.*] Said goods were of the value of \$—.

On the — day of —, 18—, the defendant obtained possession of said goods and chattels, and unlawfully and wrongfully converted the same to his own use, thereby damaging the said O. D. in the sum of \$—.

That on the — day of —, 18—, said O. D., for a valuable consideration, duly assigned to the plaintiff all his claim and demand against the defendant for said conversion and damages.

Plaintiff therefore asks judgment for said sum of \$—, etc.

NOTE.—An assignee before conversion need not set forth his title in the petition. *Heine v. Anderson*, 2 Duer, 818. It has been repeatedly held that

a right of action for conversion is assignable. *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Smith v. Thompson*, 54 N. W. Rep. 168; 94 Mich. 381 (1892).

Sec. 469. Petition for conversion of note or bond.—

On the — day of —, 18—, one C. D. was the owner of a certain promissory note [*or*, bond] bearing date the — day of —, 18—, calling for the sum of — dollars and payable to the plaintiff in — months from the date thereof, which said note was signed by the defendant.

On the — day of —, 18—, plaintiff delivered the said note to said defendant upon the express agreement and understanding that, upon ascertaining what it could be sold for, he would either buy it or pay said C. D. the value thereof, or would return the same to him on demand.

On the — day of —, 18—, and after said defendant had had possession of said note [*or*, bond] a sufficient length of time to have enabled him to ascertain the value thereof, said C. D. demanded said note [*or*, bond] of said defendant or its value, but the defendant, while admitting that said note [*or*, bond] was in his possession, wholly failed and refused to return it or to pay the value thereof.

That the value of said note [*or*, bond] was the sum of \$—, for which said sum with interest at — per cent. plaintiff asks judgment against said defendant.

NOTE.— An action lies for conversion of a note. *Hynes v. Patterson*, 95 N. Y. 1. But not where it has been wrongfully negotiated to a *bona fide* holder before it has any legal inception. *Decker v. Matthews*, 12 N. Y. 313. Where officer converts notes to his own use the measure of damages is the value of notes. *Brobst v. Skellen*, 16 O. S. 382. See *Doolittle v. McCullough*, 7 O. S. 303. In an action for conversion of notes it may be as for tort and for money had and received. *Thayer v. Manley*, 73 N. Y. 305; *Comstock v. Hier*, 29 Am. Rep. 142; 73 N. Y. 269. The general rule of damages of the value at the time of conversion is not applicable to stocks and bonds which are of a fluctuating character. *Dimock v. Bank*, 25 Atl. Rep. 926 (N. Y., 1893). As to burden of proof when plaintiff proves that the bond was stolen, see *Bank v. Kidder*, 13 Abb. N. C. 376.

Sec. 470. Petition where demand must be alleged.—

[*Caption.*]

On the — day of —, 18—, the plaintiff was the owner of the following described goods and chattels: [*Description.*] Said goods were of the value of \$—.

That upon said date plaintiff intrusted said goods to plaintiff for safe-keeping until he should call for them.

Plaintiff alleges that on the — day of —, 18—, he demanded of said defendant that he deliver said goods to him, which he wholly refused, and still refuses to deliver said goods to plaintiff, but has unlawfully and wrongfully converted the same to his own use, and withholds the same from the pos-

session of plaintiff, to the damage of plaintiff in the sum of \$—.

NOTE.—See *ante*, sec. 465.

Sec. 471. Petition by guardian for conversion of timber on land of minor by railroad company.—

[*Caption.*]

On the — day of —, 18—, he (plaintiff) was duly appointed and qualified as guardian of the estate of J. R. and E. C. B., minors, by the probate court of — county, Ohio, having due authority. That on the — day of —, 18—, said minor children were the owners in fee-simple of the following described real estate, situate in — county, —, to wit: [*Description of property.*]

Said land, when owned by said minors, was thickly wooded with excellent timber, and was valuable on that account; and all or nearly all of said timber was cut down and removed by persons now to this plaintiff unknown, without any authority whatever, and the same taken, used and possessed, for its own benefit, without any authority whatever, by the C., P. & A. R. R. Co., which was, on or about —, 18—, consolidated with certain other railroad companies under the name and style of the L. S. & M. S. Ry. Co., which last-named company is made a defendant in this action, and which said company is a corporation duly organized under the laws of —, etc.

By reason of the said timber being taken from said land and converted to its own use by the said C., P. & A. R. R. Co., said minor children were damaged in the amount of — dollars, for which sum plaintiff asks judgment against the defendant, the L. S. & M. S. R. Co.

NOTE.—Approved in *Railroad Co. v. Hutchins*, 87 O. S. 282, as stating a cause of action for personal property. See sec. 464. The measure of damages is the value of the timber at the time it was severed from the land. *Hulett v. Fairbanks*, 1 O. C. C. 155.

Sec. 472. Petition for the conversion of property by a railroad company which operates an express company.—

Plaintiff for his cause of action herein says that the — Railroad Company is, and had been for a long time prior to the commission of the grievances and wrongs hereinafter mentioned, a corporation duly incorporated under the laws of the state of —, and as such corporation has been all that time, and is now, running and operating numerous lines of railroads in — as common carriers of freight and passengers; [or, where a particular line is specified] and among others, it has run and operated the railroad known as —, extending from — to —.

That before and at the time of the commission of the wrongs hereinafter complained of, the said — Railroad Company

was, and ever since has been, and still is, carrying on and operating in connection with and upon and along the said railroad operated by it as aforesaid, including said — [*particular line specified*], a general express business as common carriers of package, freight and merchandise for hire, under the name of —, and making contracts and receiving freight and merchandise from other companies, corporations and persons, and receipting therefor by and under that name, and forwarding and carrying the same to the properly designated place of delivery.

[*Allegation where express company operates in the name and for the railroad company:*]

That on and prior to the — day of —, 18—, the — Express Company was a corporation duly incorporated, and as such run and operated an expressage as a common carrier for hire of packages, freight and merchandise from the city of — to the city of —.

That it was, and has been ever since before the — day of —, 18—, and is, customary and the duty, by virtue of some contract and arrangement between said — Express Company and the — Railroad Company, under the name of — Express Company [the terms of which the plaintiff does not know and cannot state], for said — Railroad Company, under the name of — Express Company, to receive packages of freight and merchandise shipped over said — Express Company's line by it, at — [*place of receiving goods*], and forward the same as common carriers by express for hire to points, including said city of — [*place of destination of goods*], along its said railroad that were not reached by said — Express Company.

That on or about —, 18—, the plaintiff at — was the owner of the following property, to wit, —, of the value of — hundred dollars. That on or about — 18—, said plaintiff, for the purpose of shipping said property above described from — to — above stated, delivered said property to the — Express Company at —, who received the same to be transported by it to its agency at —, the nearest or most convenient point to the place of destination of said goods and property at —, and there at said city of — to be delivered to the defendants to complete the transportation as such common carriers by express to —. That in pursuance of its said duty as such common carrier the said — Express Company did transport said property above described from said city of — to its agency at —, and there, on or about the — day of —, 18—, for the purpose and with the intent of having said property transported to its destination at —, it transferred and delivered said property to the said — Railroad Company under and in said name of the — Express, and said — Railroad Company did under said

name of the — Express receive said property as such common carriers by express from said — Express Company at its agency at —, under and by virtue of its said custom, contract or arrangement between it and said — Express Company aforesaid (the kind and terms of which are unknown to the plaintiff, and which he therefore cannot state), for the purpose of transporting said property from —, over its said railroad, to said city of —.

That said defendants having received said property for the purposes aforesaid, and with the promise to forward and transport said property from — to —, wilfully and unlawfully, negligently and without proper cause, but with the intention to unlawfully deprive the plaintiff of the same, would not and did not transport said goods and property to — as by their obligation aforesaid they were bound to do, and it did not and would not deliver said goods to the plaintiff, but purposely, maliciously and negligently, and for the purpose of depriving the plaintiff of the same, hid and concealed said property, while they have falsely asserted that they have sent said goods to —, and said defendants have unlawfully and corruptly embezzled said property, and still embezzle and conceal the same, falsely declaring and pretending that they do not know where the same or any part thereof is, to the damage of the plaintiff in the sum of — dollars, for which sum, with interest thereon from —, 18—, the plaintiff demands a judgment against said defendants, and asks for all other and proper relief.

NOTE.—From *B. & O. R. R. Co. v. O'Donnell*, 49 O. S. 489. Where there is a misdelivery of goods by a carrier it is liable for conversion. *Price v. Railroad Co.*, 10 Am. Rep. 475; *Clafin v. Railroad Co.*, 7 Allen, 341. A common carrier to which goods are intrusted to carry to a designated place, but which transports them to a different place for the purpose of keeping them out of the possession of the consignee, is guilty of conversion. *Id.* See *Fish v. Ferris*, 5 Duer, 49; *Lucas v. Trumball*, 15 Gray, 306; *Wheelock v. Wheelwright*, 5 Mass. 104; *Brewster v. Silliman*, 38 N. Y. 423. Delay in delivery may sometimes be excused by proof of misfortune or accident, even though not caused by act of God. *Kinnick v. Railroad Co.*, 27 Am. & Eng. R. R. Cases, 15; *Greismer v. Railroad Co.*, 26 Am. & Eng. R. R. Cases, 278; *Pittsburg Railroad v. Hallowell*, 65 Ind. 188. But the contract must be completed as soon as impediment to transportation is removed. *Railroad Co. v. O'Donnell*, *supra*. A common carrier who refuses to deliver goods to consignee until the latter pays a sum larger than is stipulated in contract for freight is guilty of conversion. *Isham v. Greenham*, 1 Handy, 358. If the company refuses to deliver to the proper person, and the goods are destroyed by fire while in the warehouse, it is liable. *Meyer v. Railroad Co.*, 24 Wis. 566; s. c., 1 Am. Rep. 207.

Sec. 473. Petition for conversion of goods delivered to another by virtue of a bill of sale to be sold and applied in payment of claims.—

On the — day of —, 18—, plaintiff was the owner of a stock of merchandise and five horses worth more than \$—, and on said date, for the purpose of securing the said defend-

ant to become a bondsman in the case of — — against this plaintiff, then pending in the court of —, for the purpose of releasing a levy made upon said property, plaintiff entered into an agreement to give said defendant a bill of sale of said property; and it was further expressly agreed by and between plaintiff and defendant that said defendant should take possession of said goods and horses and control same, and abide a trial or compromise of said suit of S. v. plaintiff; that upon final determination thereof defendant was to pay himself for all liability incurred by reason of said above-mentioned bond, all his expenses and a fair compensation to himself for his trouble and service; that the balance of said property was to be turned over to said plaintiff, or that if at any time after final determination of said suit the plaintiff should desire to take back said goods and horses or what were left thereof, it was expressly agreed by plaintiff and defendant that defendant would deliver said goods and horses, or so much as had not been sold, upon the following conditions, to wit: Defendant should be credited with whatever amount he was liable on said bond, his expenses and outlays, and a fair compensation for his services, and be debited with all the goods and horses sold, which defendant agreed should be sold in the usual way at a fair market price, and that upon thus ascertaining the amount due to the defendant from said plaintiff and the payment of the whole of said sum, defendant should turn over all of said property remaining in his hands.

In pursuance of said contract, and in order that defendant might have full control over said property and not be impeded in the sale of the same, plaintiff executed to said defendant said absolute bill of sale according to his part of the contract.

Afterwards on the — day of —, 18—, said suit of S. against plaintiff was settled. By the terms of settlement there was found due the said S. by agreement from this plaintiff the sum of \$—, and one-half the costs of said suit, taxed at \$—.

Plaintiff further says that after the settlement of said suit this plaintiff went to said defendant and asked him to turn over to him the portion of the above-mentioned property remaining unsold, and offered to pay defendant the full sum that should be found due him on settlement, in accordance with the terms of the above-mentioned contract between plaintiff and defendant. Whereupon said defendant wholly repudiated said contract and denied same, and refused to settle with this plaintiff on any terms or in any way, and refused to give him possession of said property upon any terms whatever.

Defendant has from ever since and now is selling and converting said property to his own use.

Plaintiff says that said property was worth at least \$—,

that said defendant has made in profits from the sale of said goods at retail more than his expenses and outlays incurred in selling the same. The sum of — dollars is a large compensation to defendant for all his services in said matter. That by reason of his liability on said bond the defendant will have to pay about the sum of \$—; that defendant has converted the whole of said property to his own use.

Wherefore plaintiff asks judgment against said defendant for the sum of \$— and interest, and for all proper relief.

NOTE.—Modeled from *Canfield v. Clark*, Supreme Court, unreported case, No. 1778.

Sec. 474. Defenses to actions for conversion.—An action cannot be maintained against a treasurer for conversion of an order on the treasury which the holder has deposited and received credit therefor in the bank, and which has been satisfied by giving credit to the bank upon its checks then held by the treasurer;¹ nor can it be maintained against a bank for its failure to transfer stock where the plaintiff is not entitled to such transfer.² Where a mortgagor in possession of mortgaged goods makes an assignment thereof for the benefit of creditors, and the assignee assumes charge of the same under authority of law, the mortgagee cannot sustain an action against the assignee for conversion.³ A defendant in such an action cannot urge as a defense that the property has been taken from him by a third person by legal process or otherwise.⁴ Nor is the fact that title to property is in a third person any defense, unless the defendant is in some way connected with such third person and can claim under him;⁵ nor can the motive or good faith of the defendant be set up as a defense;⁶ nor that he was mistaken as to the ownership of the property.⁷ A general denial traverses not only the conversion, but also the plaintiff's title, and hence a defendant may under such a pleading show the source from which he claims

¹ *Miles v. Reiniger*, 39 O. S. 499.

17 Wis. 550; *Ingraham v. Hammond*, 1 Hill, 358.

² *Bank v. Bank*, 36 O. S. 350.

³ *Lindeman v. Ingham*, 36 O. S. 1.

⁶ *Railroad Co. v. O'Donnell*, *supra*;

⁴ *Watson v. Coburn*, 35 Neb. 492; 53 N. W. Rep. 477 (1892). See *Railroad Co. v. O'Donnell*, 49 O. S. 439.

Robinson v. Bird, 33 N. E. Rep. 391 (Mass., 1898); *Dickson v. Caldwell*, 15 O. S. 412.

⁵ *Brown v. Shaw*, 51 Minn. 266 (1892); *Weymouth v. Railroad Co.*,

⁷ *Timber & Iron Co. v. Cooperage Co.*, 20 S. W. Rep. 566 (Mo., 1892).

title or that he has no title;¹ or that the property belonged to a third person who transferred it to plaintiff without consideration and with intent to cheat such third person,² or that the defendant has a mortgage on the property.³ A general denial and justification, however, are inconsistent, and therefore cannot be made in the same pleading;⁴ nor can the defendant show under a general denial that a promise supporting a bill of sale was an unlawful preference.⁵

¹ *Brevoort v. Brevoort*, 8 J. & S. 211; *Robinson v. Frost*, 14 Barb. 536; *Jones v. Rahilly*, 16 Minn. 320; *Davis v. Warfield*, 38 Ind. 461; *Davis v. Hoppock*, 6 Duer, 354; *Thompson v. Sweetser*, 43 Ind. 312.

² *Swope v. Paul*, 4 Ind. App. 463.

³ *Schoenrock v. Farley*, 17 J. & S. 302.

⁴ *Zimmerman v. Lamb*, 7 Minn. 421.

⁵ *Boyle v. Williams*, 20 N. Y. S. 737.

CHAPTER 31.

DEEDS.

- Sec. 475.** Parties to actions on covenants.
476. Pleading in such action.
477. Pleading in actions upon covenants of seizin.
478. Petition for breach of covenant of seizin.
479. Petition for breach of covenant as to quantity of land.
480. Pleading in actions upon covenants against incumbrances.
481. Petition by administrator for breach of warranty as to incumbrances, where owner has been ousted by foreclosure, etc.
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- unpaid taxes and to recover the amount paid.
- Sec. 484.** Pleading in actions upon covenants of warranty.
485. Petition by assignee of grantee against grantor on covenant of warranty.
486. Petition by devisee or grantee against grantor on covenant of warranty.
487. Actions upon other covenants.
488. Petition for breach of covenant of quiet enjoyment.
489. Petition by assignee for breach of covenant in lease to insure.
490. Petition for breach of covenant of grantee to build.
491. Defenses to actions upon covenants generally.
492. Answer setting up want of title as against note for purchase-money.

Sec. 475. Parties to actions on covenants.—Covenants in deeds respecting title which are not broken when the land descends to the heir, or which have passed to the assignee, run with the land, and upon a breach the heir, assignee or grantee who is injured thereby is the proper party to bring an action against the warrantor.¹ If the grantor is in possession under color of title, the covenant of seizin is annexed to and runs with the land, and therefore passes to the heir or assignee, who may maintain an action when ousted by paramount title. But if the grantor is not in possession the covenant is broken

¹ *King v. Kerr*, 5 O. 156; *Wyman v. Ballard*, 12 Mass. 304; 5 Conn. 497; 5 Cowen, 187.

as soon as made and does not pass with the land, but becomes a mere chose in action, passing to the personal representative of the first grantee.¹ An action on a covenant against incumbrances, broken during the life-time of an ancestor, should be brought in the name of the personal representative and not that of the heir.² Where a covenant is divisible in its nature, as if the entire interest in separate parts of land passed to different individuals, a right of action accrues to each party.³ An assignee of a reversion to whom the benefits of a lease are assigned may bring an action in his own name for a breach of covenants therein.⁴ Where a deed made in trust for the benefit of another contains covenants of seizin, warranty, and against incumbrances, which are broken at the time of its execution, the party for whom the conveyance is made may bring an action in his own name, although such covenants did not pass to him by the mere conveyance and have not been assigned.⁵ The right of a covenantee, in an action for the recovery of purchase-money, to make any person claiming an adverse interest a party, exists only where there has been a breach of the covenants in the deed.⁶

Sec. 476. Pleading in such actions.—In pleading breaches of a covenant in a deed, or in any action founded thereon, it is not good practice in Ohio to set out a copy of the deed, nor to attach a copy and make it part of the petition by reference. Such a course unnecessarily incumbers the record, and is a gross violation of the provision of the code requiring the statement of the cause of action to be set forth in plain and concise language, as well as a violation of the rule as to attaching copies which has so often been referred to in this work.⁷ But if it is necessary, in setting out the breach, to substantially set forth the covenants, such practice is proper.⁸

¹ Backus v. McCoy, 8 O. 211. Where covenants which run with the land are broken after the land has been assigned, the assignee can alone bring an action thereon. If, however, the grantor or assignor is bound to indemnify the assignee against such breach, then the assignor must bring the action. 14 Johns. 59. See 5 Cow. 187; 1 Conn. 244; 2 Pa. St. 514.

² Frink v. Bellis, 83 Ind. 185; a. c., 5 Am. Rep. 198.

³ St. Clair v. Williams, 7 O. (Pt. 2), 111.

⁴ Masury v. Southworth, 9 O. S. 340.

⁵ Hall v. Plaine, 14 O. S. 417.

⁶ Cincinnati v. Brachman, 35 O. S. 289.

⁷ Ante, secs. 57, 58, 152, 296, 347.

⁸ Ante, sec. 57; Crawford v. Satterfield, 27 O. S. 431; R. S., sec. 5086;

If more desirable, the covenants may be copied into the pleading and their breach assigned generally by negating the terms thereof.¹

Sec. 477. Pleading in actions upon covenants of seizin.—

A covenant of seizin covenants that a grantor is possessed of the estate in quantity and quality which he assumes to convey.² It is not a contract in which the immediate parties alone are interested, but is intended for the security of all subsequent grantees, and is usually extended to the heirs, assignee and executors.³ There is almost an equal division of authority upon the question as to when such a covenant is broken.⁴ It is, however, a well-settled rule of property in Ohio that it is not broken until eviction, either actual or constructive, where the grantor was in actual possession at the time of the conveyance.⁵ If the grantor be not in possession at the time of the conveyance, then the covenant is personal and is instantly broken, and becomes a chose in action entitling the grantee to maintain an action thereon. A subsequent grantee cannot sustain an action thereon, and in case of death of the first grantee, the right of action passes to the personal representative.⁶ It is therefore necessary, in bringing an action upon this class of covenants, that the petitioner aver that the grantor was not in fact seized at the time of the execution of the deed, as a breach is not sufficiently shown by merely negating the legal seizin of the grantor at the time of making the covenant.⁷ Before the adoption of

McCampbell v. Vastine, 10 Ia. 588; *Gwynne v. Jones*, 5 O. C. C. 292. The instrument attached to the pleading forms no part of it. *Larimore v. Wells*, 29 O. S. 18.

¹ *Bacon v. Lincoln*, 4 Cush. 210; s. c., 50 Am. Dec. 765. Although this rule does not apply to covenants of seizin. See *post*, sec. 477. See, also, *ante*, sec. 485.

² *Backus v. McCoy*, 8 O. 211; s. c., 17 Am. Dec. 585; *Pecare v. Chouteau*, 18 Mo. 527; *Greenby v. Wilcocks*, 2 Johns. 1; s. c., 8 Am. Dec. 379.

³ *Backus v. McCoy*, *supra*.

⁴ *5 Lawson, R. & R.*, sec. 2296.

⁵ *Backus v. McCoy*, *supra*; *Great Western Stock Co. v. Saas*, 24 O. S. 542-9; *Robinson v. Neil*, 8 O. 525; *Foot v. Burnett*, 10 O. 317; *De Vore v. Sunderland*, 17 O. 52; *Stambaugh v. Smith*, 28 O. 584; *Dickinson v. Desire*, 28 Mo. 152; *Stilla v. Hobbs*, 2 Disn. 571; *Richard v. Bent*, 59 Ill. 38; s. c., 14 Am. Rep. 1.

⁶ *Devore v. Sunderland*, 17 O. 52; *Vail v. Railroad Co.*, 1 C. S. C. R. 571. See *ante*, sec. 475; *Chapman v. Kimball*, 7 Neb. 399; *Davidson v. Cox*, 10 Neb. 150; *Betz v. Bryan*, 39 O. S. 322.

⁷ *Stambaugh v. Smith*, *supra*.

the code it was proper, in an action for a breach of a covenant of seizin, to allege the same by simply negating the words of the covenant; but as the code made no exception in this respect, it is therefore necessary to set forth the facts constituting the breach in plain and concise language.¹ A purchaser in an action for breach of a covenant, caused by want of title, for the recovery of the purchase-money, cannot be compelled to accept a title which his grantor may then have.²

Sec. 478. Petition for breach of covenant of seizin.—

On the — day of —, 18—, plaintiff purchased from the defendant the following premises situate in the county of — and state of Ohio, described as follows: [*Description.*] That plaintiff paid said defendant for said premises the sum of \$—, and said defendant executed and delivered to plaintiff his certain warranty-deed executed by said defendant and C. D., his wife, on the — day of —, 18—, thereby conveying said premises to this plaintiff in fee-simple.

That among the covenants contained in said deed and entered into by said defendant was the following: [*Copy covenant complained of.*]

That at the time of the execution and delivery of said deed by said defendant to this plaintiff said defendant was not possessed of nor was he the owner of a good and sufficient title to said premises above described, but, on the contrary, one E. F. was the true and lawful owner of a title paramount to that of said defendant, and that by reason of said paramount title so owned by said E. F. this plaintiff was ousted and dispossessed of said premises by due course of law by the said E. F., and that the covenant so made as hereinbefore stated has been wholly broken by the said defendant. That by reason of the premises and of the facts herein stated and of the breach of covenant by said defendant, plaintiff has sustained damages in the sum of \$—, for which sum with interest from — he prays judgment against said defendant.

NOTE.— See formal parts in sec. 481. If the covenantor is in possession his covenant of seizin runs with the land. If not, and the title is defective, it does not attach to the land, but is personal and is broken as soon as made, *Backus v. McCoy*, 8 O. 211 (1827); *Gest v. Kenner*, 2 Handy, 87; *Betz v. Bryan*, 39 O. S. 322. The consideration paid and interest is the rule of damages in such a case. *Id.* It is the well-established law that a covenant of seizin in a deed is not broken, where the grantor is in actual possession of the land under color of title when the deed is executed, and the grantee enters under it, until such grantee is evicted. *Betz v. Bryan*, 39 O. S. 322; *Lane v. Fury*, 31 O. S. 574; *Devore v. Sunderland*, 17 O. 52; *Foots v. Burnett*, 10 O. 317; *Robinson v. Neil*, 3 O. 525; *Backus v. McCoy*, 8 O. 211. An

¹ *Woolley v. Newcombe*, 58 How. Pr. 480.

² *Resser v. Carney*, 52 Minn. 397: s. c., 54 N. W. Rep. 89 (1893).

allegation that a defendant is not lawfully seized casts upon him the burden of proof. *Blackshire v. Homestead Co.*, 89 Iowa, 624; *Schofield v. Same*, 32 Iowa, 817; *Barker v. Kuhn*, 38 Iowa, 392. See *Mecklem v. Blake*, 16 Wis. 102; s. c., 82 Am. Dec. 707. Necessary costs incurred in defending the title, including reasonable attorneys' fees, may be recovered. *Mercantile Trust Co. v. S. P. Residence Co.*, 22 S. W. Rep. 814 (Ky., 1898). If only a technical breach, nominal damages only can be recovered. *Nozzlen v. Hunt*, 18 Iowa, 212 (1865).

Sec. 479. Petition for breach of covenant as to quantity of land.—

On the — day of —, 18—, said defendant, in consideration of the sum of \$— then paid by this plaintiff to said defendant, conveyed to the plaintiff the following described lands situate, etc.: [*Describe lands.*] That in his deed of conveyance, executed and delivered to the plaintiff, among other things said defendant covenanted and warranted said [farm] to contain — acres of land, a copy of which covenant is as follows: [*Copy covenant.*]

That said farm contained but — acres of land, and the defendant by said deed conveyed to the plaintiff, by said conveyance, only — acres, instead of — acres, as by him covenanted and warranted that he did convey; and that by reason thereof the plaintiff has been deprived of — acres of land warranted in said deed, and has sustained damages in the sum of \$—, etc.

NOTE.— See *ante*, sec. 477; Maxwell on Code Pldg., p. 87. See, also, form of commencement in sec. 481.

Sec. 480. Pleading in actions upon covenants against incumbrances.—In an action upon a covenant against incumbrances, it is not necessary to aver and prove eviction, as the same is broken as soon as an incumbrance in fact exists, upon which a right of action immediately accrues to the grantee, at least for nominal damages; and to recover actual damages it must be shown that the legal title to the outstanding estate has been extinguished.¹ The action will lie whether the incumbrance is first paid or not.² Incumbrances known to the parties at the time of the conveyance are not presumed to be excluded from the operation of such covenant. So taxes which are a lien fall within a covenant against incumbrances entitling a grantee to an action thereon.³ Where a covenant

¹ *Stambaugh v. Smith*, 23 O. S. 588; *Logan v. Moulder*, 33 Am. Dec. 388; *Stow v. Gilbert*, 1 Clev. Rep. 172. See *Stites v. Hobbs*, 1 C. S. C. R. 571; *Foot v. Burnett*, 10 O. 817; s. c., 38 (1859, Hoadley, J.).

Am. Dec. 90; *Andrews v. Dawson*, ² *Nesbitt v. Campbell*, 5 Neb. 432.

17 N. H. 418; s. c., 48 Am. Dec. 606; ³ *Long v. Moller*, 5 O. S. 272.

against incumbrances is broken by reason of a dower interest therein, the plaintiff must allege, in an action thereon, that the same has been assigned according to law.¹ An action upon a covenant against incumbrances cannot be brought before a justice of the peace. And where an action has been so commenced and appealed to the court of common pleas, another cause of action cannot be substituted by an amendment, even though it be within the jurisdiction of such court, unless consented to by the defendant, or objections thereto are waived.²

Sec. 481. Petition by administrator for breach of warranty as to incumbrances, where owner has been ousted by foreclosure, etc.—

Plaintiff says that on the — day of —, 18—, letters of administration on the estate of R. M., late of said county, theretofore deceased, intestate, were by the probate court of — county, Ohio, duly issued to plaintiff, who thereupon duly qualified and entered on the discharge of his duties as such administrator, and is now the legally appointed and duly qualified administrator of said estate; that heretofore in the life-time of said R. M., and his wife, C. M., to wit, on the — day of —, 18—, the defendant J. M., for the consideration of \$— received by said defendant to his full satisfaction of said R. M., by his deed of general warranty of that date, duly executed, sold and conveyed in fee-simple to C. M. during her natural life, with remainder to said R. M., his heirs and assigns, the following described premises situate in said county of —, to wit: [*Description.*]

That said deed contained the following covenants on the part of the defendant, to wit: [*Here give substance of covenants broken.*]

[*Or state:* And the said defendant, by his deed, covenanted to and with plaintiff that said title so conveyed was free, clear and unincumbered; and that he, the said defendant, would warrant and defend the same against all claim or claims of all persons whomsoever.]

That thereupon the said R. M. and C. M. entered into possession of said premises; that at the time of the making and delivery of said deed the premises above described were not free or clear from all incumbrance, and defendant did not have a good title thereto, but, on the contrary, the defendant before that time, on the — day of —, 18—, by deed in the nature of a mortgage duly executed, had mortgaged the said premises to one R. H. and L. H., to secure the payment

¹ *Nyce v. Obertz*, 17 O. 71 (1848).

² *Van Dyke v. Rule*, 28 W. L. B. 193; 49 O. S. 580. See *ante*, sec. 127.

of \$——, each bearing said date of ——, 18——, which mortgage deed was duly recorded in volume —— at page —— of —— county records.

That at the time of the execution and delivery of said warranty deed to said M., as aforesaid, two of said promissory notes for \$—— each, which were secured by said mortgage, were outstanding and unpaid, with interest thereon, and that B. and C. were the lawful owners and holders of the same.

That in a certain foreclosure proceeding, commenced on the —— day of ——, 18——, in the court of common pleas of —— county, Ohio, in which defendant and said M. were defendants, the said B. and C. set up their aforesaid claim and lien on the said premises by reason of said notes and mortgages, and prayed the court that their mortgage be decreed the first lien on the premises and be foreclosed, and that the said premises be sold to satisfy their said claim; that the said court, after full hearing and having complete jurisdiction of the said parties, duly decreed that the claim of B. and C. by virtue of said notes was the first lien on said premises, and that the same amounted to —— dollars, and ordered that said premises be duly advertised and sold to satisfy the same. That thereupon, in pursuance of said order, said premises were duly advertised, and on the —— day of ——, 18——, said premises were sold by the sheriff of said county of —— to W. H. for —— dollars, and the proceeds of said sale were applied to satisfy the said claim of B. and C.

Plaintiff further says that at the time said foreclosure proceedings were instituted, and for a long time thereafter and prior thereto, by reason of said lien of B. and C. by virtue of said mortgage, the said R. and C. M. were unable to raise money by means of mortgage or otherwise on said lands, and by reason thereof said lands were sold at great sacrifice.

And for a further breach the plaintiff alleges that at the time of the execution and delivery of said deed the said premises were subject to a tax theretofore duly assessed, charged as a lien upon the said premises by the said township of —— and county of ——, and by the officers thereof, of the sum of \$——, and which tax was then remaining due and unpaid, and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises; that without the knowledge or consent of said R. and C. M. —— acres of said land were duly sold by the officers of said county to satisfy said unpaid taxes; that said —— acres were well worth \$——.

That said C. M. died on the —— day of ——, 18——; that said R. M. survived his said wife, C. M., and died on the —— day of ——, 18——, intestate.

That by reason of the aforesaid premises, on the —— day of ——, 18——, the said R. M. was altogether evicted, ousted and dispossessed of said premises, and put to great expense

and trouble, to the damage of plaintiff in the sum of \$—, and interest thereon from the — day of —, 18—.

Wherefore plaintiff prays judgment against defendant for \$— and interest thereon from —, 18—, and for costs.

NOTE.—From *Marlow v. Thomas*, Adm'r, Supreme Court, unreported, No. 1918. See, also, form in *Smith v. Dixon*, 27 O. S. 471. The rule of damages where there has been an entire eviction is the amount of consideration money, with interest for such a time as will cover a claim for *mere* profits. *Wade v. Comstock*, 11 O. S. 83; *Lloyd v. Quimby*, 5 O. S. 263 (1855); *Clark v. Parr*, 14 O. 118; *Stow v. Gilbert*, 2 Clev. Rep. 321. The court is not bound by the amount recited in the deed, but may find the real consideration by parol. *Vails v. Railroad Co.*, 1 C. S. C. R. 571. In some cases, however, the measure will be the amount of the debt and the interest discharged by the foreclosure. *Lloyd v. Quimby*, *supra*. Substantial damages may be recovered. *Comstock v. Son*, 154 Mass. 389; *Mather v. Corlies*, 103 Mass. 563. This action is held to lie even if incumbrance is not paid. *Nesbitt v. Campbell*, 5 Neb. 432.

Sec. 482. Short form of petition for breach of covenant against incumbrances.—

That on the — day of —, 18—, said defendant A. B., in consideration of the sum of \$—, duly executed, acknowledged and delivered to plaintiff a warranty deed, and thereby sold and conveyed to him the following described premises: [*Describe them*].

Said defendant covenanted in said deed that said premises were free and clear from all incumbrances, etc. [*copy covenant*]. (a).

At the time the said A. B. executed and delivered said deed he did not have a good and sufficient title to said premises described in his said deed and in this petition, nor were the same free from all incumbrances at said time of the execution and delivery of said deed, but [*state what incumbrances, and the amount required to be paid to remove the same*]; the plaintiff was compelled to remove said incumbrances, and paid A. B. the sum of \$— to discharge the same, of all which the defendant was duly notified.

That no part thereof has been paid. Plaintiff has therefore sustained damages (b) in the sum of \$—, with interest from the — day of —, 18—.

NOTE.—(a) A copy of the covenants may be substantially set out. See *ante*, sec. 476.

(b) The measure of damages where the plaintiff has not entirely lost the premises, but has only been compelled to pay off incumbrances, is the amount paid in good faith to remove such incumbrances. *Foot v. Burnet*, 10 O. 317-33; *Delavergne v. Norris*, 7 Johns. 458; *Hall v. Dean*, 13 Johns. 105; *Leffinwell v. Elliot*, 10 Pick. 204; *Brooks v. Moody*, 20 Pick. 474. Nominal damages, however, can only be recovered until the incumbrance is extinguished. *Gest v. Kenner*, 2 Handy. 87. Where there has been a partial eviction, recovery is limited to a proportionate amount of the damages sustained. *King v. Kerr*, 5 O. 154; *Foot v. Burnet*, *supra*; *Clark v. Parr*, 14 O. 118; *McAlpin v. Woodruff*, 11 O. S. 129; *Johnson v. Nyce*, 17 O. 86. There can be no breach on account of a public highway when the premises were conveyed subject thereto. *Cincinnati v. Brachman*, 35 O. S. 289.

Sec. 483. Petition for breach of covenant against incumbrances on account of unpaid taxes, and to recover the amount paid.—

Plaintiff says that on the — day of —, 18—, defendant sold and conveyed to this plaintiff the following described premises: [*Description of property.*]

That said deed contained the following covenants on the part of the defendant, to wit: [*Give copy or substance of covenants broken.*]

Said premises were not free and clear of all incumbrances thereon, but on the contrary were subject to the taxes for the year 18—, amounting to the sum of — dollars, which were at the time of said deed a valid and subsisting lien thereon.

Plaintiff was compelled to and did, on the — day of —, 18—, pay to the treasurer of — county, Ohio, the said sum of — dollars, taxes as aforesaid which were a lien upon the premises. There is therefore due plaintiff from defendant the said sum of — dollars with interest from the — day of —, 18—, for so much money laid out and expended by plaintiff in the payment of said taxes so charged upon said premises for the year 18—, for which he asks judgment.

NOTE.— See *ante*, sec. 480; Long v. Moller, 5 O. S. 272. The taxes should be first paid off. Mills v. Saunders, 4 Neb. 190.

Sec. 484. Pleading in actions upon covenants of warranty.— The obligations of covenants of warranty cannot depend upon the knowledge or want of knowledge of parties. If such were the law they would amount to naught. Their purpose is to serve as a safeguard against possible ignorance of title on the part of a vendor.¹ It has been held not essential, however, that there be an actual dispossession of the grantee. If a paramount title be asserted in such a way that he must yield to it or purchase the same, such purchase will amount to an eviction; nor is it necessary that such paramount title be established by decree.² Hence it is essential, to maintain

¹ Lloyd v. Quimby, 5 O. S. 265-6. The courts of Ohio have said that the rule is universal that there can be no right of action upon a covenant of warranty unless there has been an eviction. Tuitt v. Miller, 10 O. 382 (1841); King v. Kerr, 5 O. 154; Day v. Brown, 2 O. 345; Great Western Stock Co. v. SaaS, 24 O. S. 542; Johnson v. Nyce, 17 O. 66; Innis v. Agnew, 10 O. 386; Nice v. Obertz, 17 O. 71; Gest v. Kenner, 2 Handy, 94; Hill v. Butler, 6 O. S. 207. But the contrary doctrine is maintained by other courts. 5 Lawson, R. & R., sec. 2297, and cases cited.

² Lane v. Furey, 31 O. S. 574; Betz v. Bryan, 30 O. S. 323.

an action upon the covenant of general warranty, to aver an eviction under a superior or better title.¹ A person injured by a breach of covenant of warranty may maintain an action against each intermediate warrantor, but is entitled to only one satisfaction.² In an action by the covenantee for a breach of covenant of warranty, where he has been evicted by paramount title, the facts showing eviction need not be set out, nor is it necessary to particularly describe the adverse title, as at common law it is sufficient to allege in general terms an eviction under a paramount title;³ as "that the said A. B. had not a good and sufficient title to said tract of land, and by reason thereof the plaintiffs were ousted and dispossessed of the said premises by due course of law."⁴ In actions for breach of covenant of warranty and for quiet enjoyment, it is not sufficient to merely negative the words of the covenant, as these covenants protect only against an ouster from a possession or enjoyment of the premises; and to aver a breach, therefore, an eviction must be substantially averred by title paramount.⁵ Nor is it essential to allege that the vendor had notice of the suit by which the vendee was evicted.⁶ The rule has been adopted in Ohio that there can be no action upon a covenant of general warranty where there has been a failure of title after the transfer, provided the grantor had at the date of his deed a perfect legal and equitable title.⁷ A petition alleging "that when said conveyance was made the defendant was not seized of an indivisible title in fee-simple to said land, nor was he seized of any title whatever thereto; nor had he any right to convey the same; nor has he since said conveyance become seized of any indivisible title in fee-

¹ *Innis v. Agnew*, 1 O. 389; *Robinson v. Neil*, 3 O. 525 (1828).

² *King v. Kerr*, 5 O. 154 (1831).

³ *Townsend v. Morris*, 6 Cow. 123; *Rickert v. Snyder*, 9 Wend. 416; *Kellogg v. Platt*, 33 N. J. L. 328; *Cheney v. Straube*, 53 N. W. Rep. 479 (Neb., 1892); *Maxwell's Code* Pldg. 648; *Boone's Pldg.*, sec. 245. It is only necessary to substantially allege eviction by paramount title. *Day v.*

Chism, 10 Wheat. 449; *Mills v. Rice*, 3 Neb. 76 (1873).

⁴ *Day v. Chism*, 10 Wheat. 449.

⁵ *Rawle on Covenants*, 181; *Paul v. Whitman*, 3 W. & S. 410; *Blanchard v. Hoxie*, 34 Me. 378; *Wait v. Maxwell*, 4 Pick. 87; *Mills v. Rice*, 3 Nev. 85.

⁶ *King v. Kerr*, 5 O. 158; 5 Halst. 20.

⁷ *Wade v. Comstock*, 11 O. S. 71. and cases cited on p. 79.

simple to said land, nor of any title thereto," has been held good as against a demurrer.¹ In pleading a breach of a covenant of warranty the negation of the covenant should relate to the title at the time of the conveyance. The covenants which are claimed to have been broken should be set out in the pleadings.²

Sec. 485. Petition by assignee of grantee against grantor on covenant of warranty.—

On the — day of —, 18—, for the consideration of the sum of \$— received by said defendant to his full satisfaction, by his deed of general warranty of that date duly executed, he sold and conveyed to said E. the following described premises, situate in the county of — and state of —, to wit: [*Describe them.*] That said deed contained the following covenants on the part of the defendant, to wit: [*Copy covenants.*]

That said E. went into possession of said premises under said deed, and on or about the — day of —, 18—, for a valuable consideration, conveyed the same by deed of general warranty, duly executed, to one G., who went into possession thereof, and on the — day of —, 18—, conveyed said premises by deed, duly executed, to plaintiff, who now holds said premises under said conveyance.

On the — day of —, 18—, plaintiff was evicted and dispossessed of said premises by virtue of certain proceedings duly instituted in the — court by one A. B. [*Give style and nature of case*], wherein it was adjudged that the said defendant did not have a good and sufficient title to said premises at the time of the conveyance of said premises by him to said E. Plaintiff has therefore sustained damages by reason thereof in the sum of \$—.

Sec. 486. Petition by devisee of grantee against grantor on covenant of warranty.—

On the — day of —, 18—, said defendant, in consideration of the sum of \$—, delivered to E. F. a deed of that date, duly executed, and thereby sold and conveyed to said E. F. the following described real estate: [*description*], which deed contained a covenant as follows: [*Copy or substance of covenants.*]

That the said E. F. entered into possession of said premises under said deed, and on or about the — day of —, 18—, made his last will and testament in writing, properly signed and attested, and thereby devised said premises to the plaintiff [and U. Z.], and afterwards, without changing said will

¹ Reagan v. Fox, 45 Ind. 8 (1873).

² McCampbell v. Vastine, 10 Ia

as to said devisee, on or about the — day of —, 18—, died, he at the time having his domicile in — county, Ohio.

That said will was thereafter duly admitted to probate in the probate court of — county, Ohio.

That the plaintiff thereupon entered into possession of said premises under said will, but was ousted and dispossessed thereof by due course of law by one L. X., said defendant not having a good and sufficient title to said premises at the time he executed and delivered said deed to E. F.

That the plaintiff has sustained damages by reason of the premises in the sum of \$—.

Sec. 487. Actions upon other covenants.—The cause of action on a covenant for quiet enjoyment accrues to the covenantee upon eviction by legal process under a prior mortgage.¹ A covenant for peaceable enjoyment in a ninety-nine year lease is broken by the assignment of dower in the premises, so that an action may be maintained by the lessee against the assignee of the reversion.² Where one has entered into mutual covenants with another, such as a covenant to convey and to pay, the purchaser cannot maintain an action thereon without averring payment or tender of the purchase-money.³ If payment is to be made at stated periods and the purchaser is placed in possession, a cause of action arises for the sums agreed to be paid as they become due, without a tender by the vendor of a conveyance.⁴ An action may be maintained on an instrument which has been executed and recorded according to statute, if it has been acted upon by the parties in accordance with the terms thereof.⁵ In alleging a breach of covenant where the liability depends on the performance of a condition, its performance or a tender must be averred; if there are mutual conditions, the plaintiff must aver readiness or an offer to perform.⁶

Sec. 488. Petition for breach of covenant for quiet enjoyment.—

On the — day of —, 18—, the defendant A. D. and his wife, C. D., in consideration of the sum of \$— then paid,

¹Smith v. Dixon, 27 O. S. 471; ²McCoy v. Bixbee, 6 O. 310 (1834);
White v. Whitney, 8 Met. 81; Tufts Campbell v. Gittings, 19 O. 847 (1850).
v. Adams, 8 Pick. 547; Furnas v. ⁴Wiggins v. Bridge Co., 1 Disn.
Durgan, 119 Mass. 500; Cheney v. 578 (1857).
Straube, 58 N. W. Rep. 477 (Neb., ⁵Bridgeman v. Wells, 18 O. 43.
1892). ⁶Courcier v. Graham, 1 O. 331-342:

³McAlpin v. Woodruff, 1 Disn. 339. ⁵Johns. 179.

delivered to the plaintiff a deed for the following described premises, situate in the county of — and state of —, to wit: [*Describe land.*] Said deed contained a covenant for quiet enjoyment as follows: [*Copy covenant.*]

That plaintiff, upon receiving said conveyance, immediately went into possession of the said premises under and by virtue of said deed, and had only remained in possession thereof until the — day of —, 18—, when he was lawfully evicted therefrom by A. B., and is now excluded from the possession and enjoyment of said premises.

That plaintiff has therefore, by reason of said lawful eviction, wholly lost said premises and the improvements and money expended by him thereon while in possession under said conveyance from the defendant, and has therefore sustained damages in the sum of \$—, for which he asks judgment.

NOTE.—See *ante*, sec. 487. The words “grants, demises and leases,” in the absence of other covenants in a lease, imply a general warranty of quiet possession. But where there is a covenant for quiet enjoyment no such general warranty exists. *Tooker v. Grotenkemper*, 1 C. S. C. R. 88 (1870).

Sec. 489. Petition by assignee for breach of covenant in lease to insure.—

On the — day of —, 18—, S. A. P. executed and delivered a lease to one F., thereby leasing and demising to said F. certain premises situated in the city of C., county of —, and state of Ohio, and described as follows: [*Description.*]

The terms of said lease were such that said premises were leased to said F. for a term of — years, beginning on the — day of —, 18—, and ending on the — day of —, 18—.

It was covenanted and agreed in said lease by and between the said S. A. P. and F., parties thereto, that the said F. should keep said leased premises fully insured for the benefit of the said S. A. P., and that if at any time the said F. should fail to keep the same so insured, that the said P. might cause an insurance to be made and placed upon said premises at the expense of said F., and in the name and for the benefit of the said P. It was also further stipulated and agreed in said lease that in case said building upon said premises should burn down during the continuance of said lease, that the said F. should have the benefit of said insurance money for the purpose of rebuilding said building in case he should elect to rebuild the same.

On the — day of —, 18—, said lease was deposited with the recorder of — county, Ohio, and was by him duly re-

corded in the record of leases in said county, volume —, page —.

On the — day of —, 18—, the said S. A. P., for a valuable consideration to him paid by this plaintiff, duly assigned and sold to plaintiff all his interest in said lease. The said defendant on the — day of —, 18—, went into possession of the said premises under and by virtue of said lease, and on that date a policy of insurance for the sum of — dollars was placed upon said premises by the said F., which said insurance policy expired on the — day of —, 18—. That at the time of the expiration of the said policy this plaintiff requested said defendant to reinsure said premises, which he neglected and refused to do.

That by reason of the failure of said defendant to fully keep and perform his covenant in this behalf, plaintiff was compelled to and did, on the — day of —, 18—, expend the sum of \$— for the purpose of reinsuring said premises.

[*Prayer.*]

NOTE.—See *Masury v. Southwork*, 9 O. S. 340. Such a covenant runs with the land. Id.

Sec. 490. Petition for breach of covenant of grantee to build.—

That on the — day of —, 18—, plaintiff was the owner and in possession of the following described lands: [*describe land*], and on the — day of —, 18—, plaintiff laid out said premises into streets, lots and blocks [as an addition to the city of —], and offered said lots for sale for the purpose of erecting dwelling-houses thereon.

That the erection of dwelling-houses on the lots so sold greatly enhanced the value of the remaining lots in said addition belonging to the plaintiff. On the — day of —, 18—, in consideration of the sum of \$—, plaintiff sold and conveyed to said defendant lot 1, in block 2, in said addition, and the said defendant, as a further inducement and consideration for said sale, undertook by his covenant in the deed of conveyance executed by the plaintiff to the defendant, to erect thereon a dwelling-house of the following dimensions: [*state in full*], to cost not less than \$—, and have the same finished and complete on or before the — day of —, 18— [*or copy covenant*].

In consideration of said covenant and agreement on the part of said defendant, the plaintiff did on said day sell and convey to said defendant the aforesaid lot for the sum of \$—, the actual value thereof at that time being the sum of \$—, but the defendant has wholly failed to erect said dwelling; and, on the contrary, has permitted said lot to remain vacant and unoccupied.

Defendant is therefore indebted to the plaintiff for the difference between the price paid and the actual value of said lot, to wit, the sum of \$——, and also for the damages sustained by a breach of said covenant in depreciating the value of the plaintiff's remaining lots in said addition, to wit, \$——. That plaintiff has sustained damages in the sum of \$——.

NOTE.—From Thornton's Forms.

Sec. 491. Defenses to actions upon covenants generally.

An answer of a grantor to an action by a covenantee upon a covenant against incumbrances, claiming that the deed was made upon a consideration contained in an article of agreement that the covenantee would assume, as part of the consideration, the payment of such incumbrances, is a bar to the action.¹ Although a covenantee may bring several actions against each successive covenantor, and recover several judgments against each,² a satisfaction against one is a bar to an action against a second covenantor.³ A purchaser cannot set up as a defense to an action for purchase-money a breach of covenant in the deed, by reason whereof he had been deprived of his right to maintain and use the projection of a roof and eaves, unless he can show that the right thereto belonged to the grantor, and the burden of proof is upon him.⁴ A grantor in an action against him for the recovery of purchase-money may recoup for any damages he may have sustained by reason of failure of title and consequent loss of the premises conveyed.⁵ An assignment of the expenses of constructing a ditch made by the commissioners of a county in pursuance of law is not an incumbrance upon which recovery may be had for a breach of covenant against incumbrances by a covenantee against a covenantor who became the purchaser thereof after the ditch was established.⁶ Greater strictness is required in pleading covenants in deeds than in other actions. If a defendant relies upon some matter of excuse for the non-performance of his covenant, or if he desires to excuse himself because of the non-performance of a covenant by the plaintiff, he must specially plead the same.⁷ An answer admitting the

¹ *Reid v. Sycks*, 27 O. S. 285.

² *King v. Kern*, 5 O. 155; *Foote v. Burnett*, 10 O. 817; *Wilson v. Taylor*, 9 O. 597.

³ *Wilson v. Taylor*, *supra*.

⁴ *Meek v. Breckenridge*, 29 O. S. 642 (1876).

⁵ *Gest v. Kenner*, 2 Handy, 87.

⁶ *Newcomb v. Feidler*, 24 O. S. 468.

⁷ *Courcier v. Graham*, 16 O. 845, 846.

covenant, setting up an oral contract by which it was agreed that the plaintiff was to pay the incumbrances with a part of the purchase-money retained by him, alleging no fraud or mistake, does not constitute a defense to an action to recover damages for a breach because it does not come within the exception in respect to parol proof of consideration.¹ The statute of limitation cannot be made available as a defense under a general demurrer where the petition in an action for breach of covenant of warranty does not show when the cause of action arose.²

Sec. 492. Answer setting up want of title as against note for purchase-money.—

[Caption.]

That the note sued on herein was given in consideration of a conveyance by the plaintiff to defendant by a deed of general warranty [*or*, in which he covenanted that he was seized and possessed of the real estate therein described by a title in fee-simple], a copy of which covenant is as follows: [*Copy of covenant or substance.*]

That plaintiff had not at the date of the execution of said deed nor has he since obtained any title to said real estate or any part of it.

That defendant, by reason of the plaintiff's want of title, did not obtain possession of said real estate, and is not now in possession [*or*, defendant took possession of said real estate, but was, on the — day of —, 18—, evicted therefrom by R. F., who was the owner in fee-simple and entitled to the possession thereof, and is now in possession]. That there was no other consideration for said note.

¹ *Hott v. McDonough*, 8 O. C. C. 177. ² *Mills v. Rice*, 8 Neb. 76.

CHAPTER 32.

DIVORCE AND ALIMONY.

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| <p>Sec. 493. Introductory.</p> <p>494. Residence of plaintiff.</p> <p>495. Petition, where filed.</p> <p>496. Preparation of petition.</p> <p>497. Causes for divorce enumerated.</p> <p>498. Causes — Husband or wife living at time of marriage.</p> <p>499. Petition on ground of prior marriage.</p> <p>500. Causes — Absence for three years.</p> <p>501. Petition for wilful absence.</p> <p>502. Causes — Adultery.</p> <p>503. Petition on ground of adultery.</p> <p>504. Causes — Impotency.</p> <p>505. Petition on ground of impotency.</p> <p>506. Causes — Extreme cruelty.</p> <p>507. Petition on ground of extreme cruelty.</p> <p>507a. Petition on ground of extreme cruelty and drunkenness, and for alimony where husband owns real estate.</p> <p>508. Causes — Fraudulent contract.</p> <p>509. Petition on ground of fraudulent contract.</p> <p>510. Causes — Any gross neglect of duty.</p> <p>511. Petition on ground of gross neglect of duty by failing to provide.</p> | <p>Sec. 512. Causes — Habitual drunkenness.</p> <p>513. Causes — Imprisonment in penitentiary.</p> <p>514. Petition on ground of imprisonment.</p> <p>515. Service.</p> <p>516. Affidavit for service by publication.</p> <p>517. Effect of foreign divorces.</p> <p>518. Petition to nullify marriage with imbecile.</p> <p>519. Petition to annul marriage with minor.</p> <p>520. The answer.</p> <p>521. Forms of answers.</p> <p>521a. Answer and cross-petition.</p> <p>522. The trial.</p> <p>523. Custody of minor children.</p> <p>524. Petition by divorced wife against father for support of child.</p> <p>525. Allowance of alimony in divorce proceedings.</p> <p>526. Proceedings for alimony alone.</p> <p>527. Petition for alimony alone.</p> <p>528. Allowance of temporary alimony.</p> <p>529. Petition by divorced wife against divorced husband's widow and heirs to enforce payment of decree for alimony against his real estate, and note.</p> |
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Sec. 493. Introductory.—The law in Ohio on the subject of divorce is largely confined to statutes. There are but few decisions under the various provisions because of the fact that cases cannot be taken beyond the trial court unless involving

a question of alimony or the custody of minor children. The law is therefore confined to such cases as were adjudicated before the law was enacted which confined the controversies to trial courts, and to such other cases as may appear in unofficial reports decided by trial courts. A systematic collection and treatment of those cases, supplemented by such others as may seem proper, may not be out of place. Many have no doubt been importuned to prosecute a suit upon the theory that all that is necessary is to have a cause, and that both parties are willing, the applicants not knowing that when a case discloses such a state of facts the court will refuse relief;¹ or if the case appears to be a suspicious one, or there has been collusion, or something is kept back, a divorce will not be granted;² and that it will not ratify an agreement made by parties for a divorce, and will probably censure an attorney who undertakes to palm such an agreement upon the court as adversary.³

Sec. 494. Residence of plaintiff.—The statute provides⁴ that the plaintiff, except in actions for alimony alone, must be a resident of the state for at least one year before filing the petition. If the wife makes the application for divorce, the fact that the residence of the husband is different from that of the wife does not preclude the latter from filing her petition in the county where she may reside;⁵ as the rule that the domicile of a wife must be governed by that of her husband has no application to a suit by her for divorce, under a statute requiring it to be brought in the county where the injured party resides.⁶ The suit must, however, be brought where she actually resides.⁷ Where the conduct of the husband has been such that the wife has been compelled to leave him, sufficient to give rise to a cause for divorce, she may do so and select a separate domicile, and in such case her domicile is not that of her husband.⁸

¹Smith, W. 643, 644; Latham, 80 Gratt. 43.

²Wolf, W. 248; Friend, W. 639.

³Smith, W. 643; Blank v. Nohl, 112 Mo. 159 (1892); Stoutenburg v. Lybrand, 13 O. S. 228; Cross, 58 N. H. 373.

⁴O. Code, sec. 5690.

⁵O. Code, sec. 5691.

⁶Cox, 19 O. S. 503; Hunt, 72 N. Y. 217; Colvin v. Reed, 55 Pa. St. 375.

⁷Id.; Smith, 11 Pa. Co. Ct. Rep. 465; Hewes, 16 N. Y. Supp. 119. Cf. Loker v. Gerald, 31 N. E. Rep. 709 (Mass., 1892); Wood, 54 Ark. 172; 15 S. W. Rep. 459.

⁸Smith, 42 La. Ann. 1140; Thompson, 11 L. R. A. 443, and note; 8 C.

Sec. 495. Petition, where filed.—An action for divorce and alimony must be brought in the county where the plaintiff has a *bona fide* residence at the time the same is instituted, or in the county where it arose; and the court is required to hear and determine the same whether the marriage took place, or the cause of divorce occurred, within or without the state.¹

Sec. 496. Preparation of petition.—The petition must allege that the plaintiff is an actual resident of the county where suit is brought; that plaintiff had a *bona fide* residence in the state at least one year before the application; the time and place of marriage; the names and ages of the children, if any; a brief statement of the cause or grounds for divorce; and if adultery be the cause, the time and place of the offense, and the person with whom committed, if known, and if unknown, the reason for the omission should be given.² If alimony be sought, the petition should set out, as near as may be, the kind and amount of personal property, and a description of the real estate of defendant.³ And other persons claiming any interest in the property may be made parties, and the court may determine the interests of all concerned.* Unlike the rule in other cases, it is not necessary that the pleadings in divorce proceedings be verified,⁴ but they may be amended as other pleadings, in which case new service should be made; waiver of counsel can not be received in lieu of service in any case.⁵ If an injunction is prayed for, however, it would be proper to verify the petition positively, to comply with the rule as to obtaining an injunction, as the latter rule can not be dispensed with. The facts pleaded by plaintiff may place him in such a position as to require him to aver and prove that there has been no condonation; and it has been held that the rule requiring affirmative defenses to be pleaded applies to suits for divorce.⁶ It has also been held unnecessary to aver that the offense has not been condoned, upon the ground that it is a matter of defense.⁷ It should be alleged, however, that the parties are no longer living together.

Sec. 497. Causes for divorce enumerated.—The statute⁸ provides that courts of common pleas may grant divorces for the following causes: 1. That either party had a husband or

¹ So. Rep. 419; Watkins, 125 Ind. 163.

² O. Code, sec. 5960; Woods, 44 O. S. 455, 456.

³ Bird, W. 98; Dunlap, W. 210; Mansfield, W. 284; Richards, W. 302.

⁴ Lattier, 5 O. 538; Randall, 31 Mich. 194; Germond, 6 Johns. Ch. 347; Boone's Pldg., sec. 141.

⁵ R. S., sec. 5697.

⁶ Stewart's M. & D., sec. 224; Smith, W. 643.

⁷ Roe, 14 Hun, 614; Smith, 4 Paige, 432.

⁸ Young, 18 Minn. 90.

⁹ O. Code, sec. 5689.

*Fletcher v. Id., 15 O. C. C. 271.

wife living at the time of the marriage from which the divorce is sought. 2. Wilful absence of either party from the other for three years. 3. Adultery. 4. Impotency. 5. Extreme cruelty. 6. Fraudulent contract. 7. Any gross neglect of duty. 8. Habitual drunkenness for three years. 9. The imprisonment of either party in a penitentiary under sentence thereto; but the petition for divorce under this clause shall be filed during the imprisonment of the adverse party.

Sec. 498. Causes—Husband or wife living at time of marriage.—Divorce may be granted if either had a husband or wife living at the time of marriage from which the divorce is sought.¹ The court may, in cases where the divorce is sought upon this ground, in its discretion admit proof of cohabitation and reputation as evidence of the marriage of the parties;¹ and alimony may also be decreed to the petitioner.³

Sec. 499. Petition on ground of prior marriage.—

Plaintiff is a *bona fide* resident of — county, Ohio, and has been a permanent resident of the state of Ohio for the year last past.

On the — day —, 18—, at C., in the county of —, Ohio, she was married to the defendant, and that the following named children were born as the issue of such marriage, whose names and ages are as follows [*give names and ages*], [*or, to which marriage there have been no children born.*]*

At the time of the marriage of plaintiff to said defendant, the said defendant had a wife then living, to whom he had theretofore been married on or about — [*give date if known*], at —.

Plaintiff therefore asks that she may be divorced from said defendant, and for such other relief as is proper.

Sec. 500. Causes—Absence for three years.—A divorce will be granted where either party has been wilfully absent for three years.⁴ It is wilful absence sufficient to authorize the granting of a divorce where a wife leaves her husband shortly after marriage, declaring that she will not be confined to one man, and continues absent for three years;⁵ or where the husband has left the wife with the children for more than three years without contributing to their support;⁶ or where a husband sends his wife to see her brother under the false

¹ O. Code, sec. 5689.

² Hout, 5 O. 539.

³ Vanvaley, 19 O. 8. 588.

⁴ O. Code, sec. 5689.

⁵ Milliner, W. 138.

⁶ White, W. 138.

pretense that he is sick, and, availing himself of her absence, leaves the country, and continues absent for three years;¹ or where the husband sends his wife to her friends and leaves the country without any known cause, remaining absent for more than three years;² or where a husband leaves his wife and continues drunk about the streets for three years;³ or where the wife leaves the husband after a quarrel and continues absent for more than three years, refusing to return;⁴ or where the husband converts his effects into money, leaves his wife and departs for a foreign country, where he remains for three years;⁵ or where the husband leaves his wife without any known cause, remaining away for more than three years;⁶ or where the husband is lazy, loitering about, neglecting to provide for his family for more than three years;⁷ or where parties have been married to avoid the consequence of bastardy proceedings, and the husband refuses to live with the wife for more than three years.⁸ Fear on the part of the wife of having too many children is not cause for leaving her husband, and her absence will be considered wilful.⁹ It is not wilful absence for a man to frequently leave his family poorly provided, but returning; and if the wife afterwards goes to her friends and the husband removes to another country, remaining there two or three years, the time is too uncertain to constitute wilful absence for three years.¹⁰ But where a man leaves his wife with a scanty supply and goes off for months to labor, and upon his return finds his wife has gone to her friends with her furniture, it does not constitute wilful absence without proof that he went after her, desired her to return or informed her that he had returned.¹¹ A man will not be divorced for the absence of his wife among her friends, where the husband used undue means to coerce her, she being a child of fourteen, against her declaration that she does not love him, without his having made decided efforts to win her affections

¹ Cossan, W. 147.

² St. John, W. 811.

³ Clark, W. 225.

⁴ Thompson, W. 470.

⁵ Guembell, W. 226.

⁶ Roberts, W. 149; Wyatt, W. 140.

⁷ Amsden, W. 66.

⁸ McQuaid, W. 233.

⁹ Leavitt, W. 712. See *post*, sec. 508, and note 8.

¹⁰ Johnston, W. 454.

¹¹ Frarell, W. 455.

and to induce her to live with him.¹ Where the wilful absence relied upon was a leaving at the request of the petitioner or with funds furnished her, it will not avail her as a ground of divorce;² and wilful absence will not be presumed against circumstances tending to show the separation by the procurement of the party alleging it.³ The wilful absence must be full three years, and it will be computed from the time he determines to continue away, although he may have been absent longer, but intended to return when leaving.⁴ An agreement between man and wife to divide their effects and their subsequent separation cannot lay the foundation for a divorce for wilful absence.⁵ If a wife refuse to support a drunken husband or longer cohabit with him, in consequence of which he leaves her, the absence is not wilful on his part to entitle her to a divorce for that cause.⁶ If the husband, having left his wife two months, returns and makes efforts to live with her, which have failed from any cause, he cannot be regarded as wilfully absent from her;⁷ or where the absence is under an agreement of separation, or there is collusion or condonation, there can be no decree of divorce.⁸ Where the evidence tends to create suspicion that the parties separated without good reasons and were anxious to be divorced, the court will be slow to grant the divorce.⁹ Mere separation does not give a cause of divorce; and absence to be a cause must be wilful, and is not inferred from the fact of separation.¹⁰

Sec. 501. Petition for wilful absence.—

[*Averments as in ante, sec. 499.**]

Plaintiff further says that the said defendant has been wilfully absent from plaintiff for more than three years last past, and wholly disregarded all marital duties.

[*Prayer, etc.*]

NOTE.—Want of affection between husband and wife is no defense to an action by the husband for divorce on the ground of desertion. *Taylor v. Taylor*, 45 N. W. Rep. 307; *Lane v. Lane*, 67 Ia. 76.

¹ Bigelow, W. 416.

² Barnes, W. 475.

³ Scott, W. 409.

⁴ Reed, W. 224.

⁵ Van Vorhees, W. 636.

⁶ Helser, W. 210.

⁷ Friend, W. 639.

⁸ Mansfield, W. 284; McDwire, W. 354.

⁹ Wolf, W. 248, as it will not grant a divorce by consent. *Smith*, W. 648.

¹⁰ Ferree, 7 W. L. B. 802; Thompson, 1 S. & T. 281.

Sec. 502. Causes — Adultery.—As heretofore stated,¹ when divorce is sought upon this ground, the petition must set forth the name of the person with whom adultery was committed, and if not known the want of knowledge must be averred, and a reason given for the omission. It must also be charged to have been committed at a particular place.² An allegation that adultery was committed “with a certain woman” is uncertain and not therefore a compliance with the statute.³ A decree will be granted for a single act of adultery,⁴ and it may be inferred from the fact that a man passed the night alone in a room with a woman.⁵ One who has himself committed adultery cannot procure a divorce;⁶ nor can a man who has been divorced from a woman whom he had seduced while the wife of another, and whom he has abandoned, because she has committed adultery after such desertion.⁷ Evidence of the commission of bigamy in another state is not proof of adultery.⁸

Sec. 503. Petition on ground of adultery.—

[*Averments as in sec. 499.**]

That since said marriage was contracted, and on or about the — day of —, 18—, the defendant [at the — of —, in the state of —] committed adultery with one I. M.

[*Or*, That on or about the — day of —, 18— (*or*, some time in the month of —, in the year 18—), the defendant committed adultery with one F. P. at the — hotel, in the — of —, in the state of —, and that the defendant, at various other times in the year 18—, committed adultery with various other (women) whose names are unknown to the plaintiff, at certain other places in the city of —.]

That immediately upon discovering that said defendant had been guilty of said crime of adultery, to wit: —, 18—, plaintiff ceased to live and cohabit with defendant, and has ever since remained away from her [*or* him].

NOTE.—*Costs*: A court cannot require a petitioner who is entitled to a decree to pay the costs as a condition precedent to the entry of the same. *State v. Bates*, 5 O. C. C. 18; *Heffer v. Scranton*, 27 O. S. 579.

Sec. 504. Causes—Impotency.—Divorces granted on the ground of the impotency of one of the parties are rare and no new cases can therefore be added.⁹ The mere fact that a

¹ *Ante*, sec. 496; *Dunlap*, W. 210; *Richards*, W. 302; *Freeman*, 31 Wis. 235.

² *Smith*, W. 643; *Miller*, 20 N. J. Eq. 216-17; *Caldwell*, 12 Hun, 92.

³ *Mansfield*, W. 284; *Van Vorhees*, W. 636. Although general allega-

tions have sometimes been held sufficient. *Maxwell's Pldg.*, 178-9.

⁴ *Wilson*, W. 128.

⁵ *Fenger*, 7 W. L. B. 304

⁶ *Maddox*, 2 O. 233.

⁷ *Mayer*, 2 W. L. B. 47

⁸ *Wilson*, W. 128.

⁹ *Keith*, W. 518.

woman is sterile does not constitute impotency.¹ The petition in this case must specifically state that the impotency existed at the time of the marriage,² that it was unknown to the plaintiff,³ and that it still exists and is incurable.⁴ A voluntary separation between husband and wife will not operate as a bar to a divorce upon this ground.⁵

Sec. 505. Petition on ground of impotency.—

[*Averments as in sec. 499.**]

That at the time of entering into the marriage with said defendant plaintiff believed her to be a woman capable of entering into the marriage state, and of performing all the duties and relations of a wife.

That he took her to his residence [*or*, that she took up her residence with him], and for the space of six months endeavored to cohabit with her as his wife, until he ascertained, both from his own knowledge and from her own admissions and confessions, that she was and ever had been physically incapable of cohabitation or sexual intercourse, or of entering into the marriage state, by reason of [*here state nature of incapacity*].

And plaintiff alleges, upon information and belief, that the said defendant was, at the time of such marriage, physically incapable of entering into the marriage state, and that such incapacity still continues and is incurable.]

[*Or*, That the defendant was wholly impotent at the time of said marriage of the plaintiff to her, and still continues to be so.]

Sec. 506. Causes—Extreme cruelty.—At one time it was considered that some physical violence was essential to constitute cruelty.⁶ But the modern doctrine, adopted in the interest of society, does not confine the term to such narrow limits. A general definition of legal cruelty cannot be formulated, as it always depends upon the character, habits and disposition of the parties,⁷ and must be left to the sound discretion of the courts.⁸ But it is generally conceded that such unjustifiable conduct as will wound the feelings, endanger the health, destroy the peace of mind, and utterly destroy the

¹ Devanbaugh, 5 Paige, 556.

Kempf, 34 Mo. 211-13; Bascomb, 25

² Powell, 18 Kan. 371; J. G. v. H. G., 33 Md. 401; Bascomb, 25 N. H. 267.

N. H. 267; Morrell, 17 Hun, 324.

³ J. G. v. H. G., 33 Md. 401.

⁴ Conn. W. 563.

⁵ Gulick, 41 N. J. L. 13; J. G. v. H. G., 33 Md. 401.

⁷ Kennedy, 73 N. Y. 869; Carpenter, 10 W. L. B. 409; s. c., 30 Kan. 713.

⁸ Slagg v. Edgcomb, 8 S. & T. 240;

⁸ Duhme, 3 W. L. G. 186.

very objects of matrimony, constitute cruelty.¹ Withholding medical assistance when able to furnish it;² profane, obscene and insulting language habitually indulged in towards a person of sensitive nature and refined feeling;³ or charges made of want of chastity,⁴ or subjection to excessive sexual intercourse,⁵ constitute extreme cruelty. But mere words will not necessarily constitute cruelty.⁶ Refusal of the husband to have sexual intercourse with the wife is not "cruel and inhuman treatment" authorizing a divorce.⁷ If parties cohabit after the commission of acts of cruelty, the same are condoned and cannot be relied upon as a ground for divorce.⁸ A divorce will sometimes be granted for one act of cruelty if of an aggravated and outrageous character, or an outgrowth of a continued and systematic course of oppression.⁹ In pleading cruelty the specific acts must be clearly set forth,¹⁰ and a decree cannot be had upon proof of personal violence not stated in the petition.¹¹ Cruelty may be set up by way of recrimination as a defense.¹²

Sec. 507. Petition on ground of extreme cruelty.—

[*Averments as in ante, sec. 499.**]

That the defendant has been guilty of extreme cruelty against this plaintiff in this, to wit: [*State facts.*]

That plaintiff has not cohabited with said defendant since [*state when, so as to show that there has been no condonement.*]

[*Prayer.*]

NOTE.—The acts of cruelty must be set forth in detail.

Alimony: If the wife has means of her own no alimony will be allowed. Methven, 60 Am. Dec. 664; Kenemer, 26 Ind. 830; Westerfield, 36 N. J. Eq. 195; Correy, 81 Ind. 469. It should appear in the petition that the wife has no separate property of her own. Ross, 47 Mich. 185.

¹ Duhme, 3 W. L. G. 186; Carpenter, 10 W. L. B. 409; Green, 15 W. L. B. 113; Kennedy, 73 N. Y. 369; Gibbs, 18 Kan. 419; Bennett, 24 Mich. 482.

² Evans, 1 Hag. Con. 35; Dysert, 1 Robt. 106; 1 Bishop on M. & D. 735.

³ Bennett, 24 Mich. 482; Briggs, 20 Mich. 34; Green, 15 W. L. B. 113; Beebe, 10 Ia. 133; Beyer, 50 Wis. 254; Powelson, 52 Cal. 358; Whitmore, 49 Mich. 417.

⁴ Green, 15 W. L. B. 113; Beebe, 10 Ia. 133; Palmer, 45 Mich. 150.

⁵ Melvin, 58 N. H. 562.

⁶ Hansel, W. 212.

⁷ Schoessow, 33 Wis. 553; Fritz, 138 Ill. 436; 14 L. R. A. 635 and note.

⁸ Questel, W. 491.

⁹ Hummel, 1 W. L. B. 153; Poor, 8 N. H. 307; Beyer, 50 Wis. 254; Mason, 181 Pa. St. 161.

¹⁰ Conn. W. 563; Walton, 20 How. Pr. 347; Young, 18 Minn. 90.

¹¹ Bennett, 24 Mich. 482.

¹² Church, 16 R. I. 667; 7 L. R. A. 385; 19 Atl. Rep. 244 (1890).

Sec. 507a. Petition on ground of extreme cruelty and drunkenness, and for alimony where husband owns real estate.—

The plaintiff, M. G., says that she is a *bona fide* resident of the county of H. and state of Ohio, and has been a permanent resident of the county and state aforesaid for several years last past [*or*, one year last past]; that on or about the — day of —, 18—, at —, she was married to the defendant [and that ever since said marriage she has conducted herself toward the said defendant, R. G., as a faithful and obedient wife]. Plaintiff says there are no children as the issue of said marriage [*or*, the issue of which marriage being the following children].

1. On the — day of —, 18—, the said defendant [without any just cause or justification whatever so far as this plaintiff is concerned] was guilty of extreme cruelty toward her by striking her with his fist and otherwise beating and maltreating her in a shameful manner. And plaintiff further alleges and says that said defendant has on divers and sundry times prior to the — day of —, 18—, been guilty of extreme acts of cruelty towards her by striking, beating and threatening to kill her; and that said defendant has on various occasions within the last three years, and prior to the last alleged act of cruelty herein mentioned, driven her from the house at night-time, when she would be compelled to remain away for hours at a time.

2. Second cause of action. [*Formal averments*], and says the said defendant has been guilty of habitual drunkenness for more than three years last past.

Plaintiff further states that, in addition to a store and a large amount of stock therein and other personal property, the said defendant is the owner of the following described real estate, to wit: [*Description of realty*.]

Plaintiff further says that she has not cohabited with the said defendant for more than one year last past.

Wherefore plaintiff prays the court that upon the hearing of this cause she be divorced from said defendant; that reasonable alimony be allowed her out of the property of said defendant; that she be restored to her maiden name, M. T., and for such other and further relief as in equity she may be entitled to.

Prayer for custody of children and alimony: C

Wherefore the plaintiff prays judgment divorcing the said plaintiff and defendant and dissolving the said marriage, and that the plaintiff may be awarded the custody of said children [and that the court may require the defendant to provide suitably for the education and maintenance of the said chil-

dren, and for the support of the plaintiff, and that she may have temporary alimony and the costs of this action].

Sec. 508. Causes — Fraudulent contract.—It is a fraud for a pregnant woman to represent herself virtuous to induce marriage, and to take means to prevent discovery of her condition, and divorce will be granted under such circumstances.¹ But merely representing herself chaste when in fact she was not is not such fraud as will warrant a divorce.² Representations as to respectability, connections in society, wealth, or matters of this kind, are not such frauds as will warrant a decree for divorce.³ In the interest of society it has been considered that want of chastity, even though representations to the contrary are made by a woman, does not fall within the ground mentioned in the statute as fraudulent contracts.⁴ But where the woman is pregnant it is quite different.⁵ A somewhat peculiar case is found where the husband or man goes through the marriage ceremony without any intention of living with the woman, but only to escape bastardy proceedings. The court calls it an unconsummated marriage, voidable at the election of the wife, annuls it and grants an absolute divorce.⁶

¹ Morris, W. 630.

² Meyer, 4 W. L. B. 868-70.

³ Meyer, 4 W. L. B. 868; Reynolds, 3 Allen, 605; Clarke, 11 Abbott's Pr. 228; Carris, 24 N. J. Eq. 516; Wier, 81 Iowa, 110.

⁴ Allen's Appeal, 99 Pa. St. 196. There is no implied warranty of chastity. Varney, 52 Wis. 120, 180; s. c., 38 Am. Rep. 726.

⁵ Long, 77 N. C. 804; s. c., 24 Am. Rep. 449; Reynolds, 3 Allen, 605; Baker, 13 Cal. 87; Morris, W. 630; Carris, 24 N. J. Eq. 516.

⁶ Miller v. Miller, 81 W. L. B. 141 (Scioto, Ohio, Common Pleas). If it is an unconsummated marriage, and hence voidable, how can the court grant a divorce? The court, however, in the syllabus, states that the marriage is annulled, and an absolute divorce granted. From the opinion,

the question of fraudulent contract seems to enter into the case very largely, and perhaps was the ground for divorce, if it was a petition for a divorce. This is not disclosed. If it was a void marriage, the petition should have been based upon that ground. It may have been. The court follows the doctrine laid down by Mr. Bishop: The absence of intention to marry, it not having been afterward consummated, would render it (the marriage contract) void, 1 Bishop's M. & D., sec. 178. The precedent is an important one. It is a novel way of being relieved from such unfortunate contracts, but the mode of relief is not clearly pointed out. If the marriage is void, it may be annulled; but a divorce cannot be granted if there is no cause for it. See *ante*, sec. 500, p. 468.

Sec. 509. Petition on ground of fraudulent contract.—

[*Averments as in sec. 499.**]

Plaintiff alleges that said defendant, for the purpose of inducing and persuading this plaintiff to enter into said marriage, falsely and fraudulently represented herself to be a virtuous and chaste woman, when in truth and in fact she was not, but was then pregnant by some man other than this plaintiff.

Plaintiff, relying upon the representations so made by said defendant, and believing the same to be true, entered into said marriage, which he would not have done had not said false representations been made to him. That immediately upon discovering that said representations were false, to wit, on or about the — day of —, 18—, he ceased to live and cohabit with said defendant, and has ever since remained away from her.

[*Or*, That the consent of the said plaintiff to said marriage was obtained by fraud, the defendant, for the purpose of obtaining said consent, having fraudulently represented to the plaintiff, prior to said marriage, that [*here state facts constituting the fraudulent representations*], which representations the plaintiff believed to be true, and was induced thereby to consent to said marriage, and entered into said marriage relying upon such representations, which representations plaintiff, after said marriage, discovered to be wholly untrue.]

NOTE.—A fraudulent marriage cannot be annulled by the one committing the fraud. Tompsett, 26 Am. Rep. 197; Frolet, 14 Am. Dec. 563. A marriage is not void if there is illicit intercourse before marriage. Crehore, 97 Mass. 330; s. c., 98 Am. Dec. 98.

Sec. 510. Causes — Any gross neglect of duty.— The determination of what is gross neglect of duty, as in the case of cruelty, must be left largely to the discretion of the court, to be governed by the peculiar circumstances of the case. The expression is so indefinite that it is difficult to formulate any general rule by which every case can be determined to fall within its limits.¹ The statute in Ohio is silent as to how long the neglect shall continue, and the trial courts of the state in some earlier cases were inclined to take the view that it partook of the nature of cruelty and wilful absence, so as to require endurance for three years.² But this is not now the practice, and a decree will be made for neglect for a less time, as circumstances may require. Whatever uncertainty may attend the definition of gross neglect of duty, it is certain that it does not consist in the husband's merely ab-

¹ Smith, 22 Kan. 699.

² Ziegler, 1 W. L. B. 163; Nail, 3 W. L. M. 328.

³ Schwarz, 6 Oh. Dec. 525.

senting himself from his wife; neither is it gross neglect of duty to merely fail to provide, at least for a short period of time, unless attended by aggravating circumstances. It must at any rate continue, not three years, but some length of time, to be left to the discretion of the court.¹ Any gross neglect of duty for a short time attended by aggravating circumstances will warrant a decree;² as where a man is intoxicated most of the time and fails to give sufficient support.³ In pleading gross neglect of duty it is not proper to merely use the language of the statute, but the specific acts which it is claimed constitute the neglect must be stated.⁴

Sec. 511. Petition on ground of gross neglect of duty by failing to provide.—

Plaintiff says that she has been a resident of the state of Ohio for a year last past, and has a *bona fide* residence in the county of —, in the state of Ohio.

On the — day of —, 18—, at —, — county, Ohio, she was married to the defendant, the issue of which marriage were the following named children: [*naming them.*]

The defendant for more than three years last past has been guilty of gross neglect of duty towards plaintiff in that, by reason of his idleness and dissipation, he has wilfully failed and neglected to provide this plaintiff and their said children with food and clothing and the common necessities of life, so that she has been compelled to live by her own exertions and labor, and on the assistance and charity rendered by her relatives, although he was fully able to properly support her and their said children.

[*Prayer.*]

Sec. 512. Causes — Habitual drunkenness.— To constitute an habitual drunkard within the meaning of the statute, a man must have the habit, and indulge the same so frequently as to become excessive, and to interfere with his business and render marriage intolerable.⁵ The allegations upon this ground may be made in the language of the statute, without stating

¹ Nichols, 8 W. L. B. 88 (Ham. Co. C. P., 1882); Stevens, 8 R. L. 557, 560; Holland, 8 W. L. B. 86; Tiberghien, 8 W. L. B. 89; Smith, 22 Kan. 699; Peabody, 104 Mass. 195; Ferree, 7 W. L. B. 303. Schwarz, 6 Oh. Dec. 525.

² Holland, 8 W. L. B. 86; Smith, 22 Kan. 699; Schwarz, 6 Oh. Dec. 525.

³ Ziegler, 1 W. L. B. 138.

⁴ Burner, 1 W. L. B. 164; Dunbar, 1 Clev. Rep. 14.

⁵ Stewart's M. & D., sec. 276; Malone, 19 Cal. 626. See Reynolds, 44 Minn. 182.

any particular facts.¹ It may simply state that the "defendant has been guilty of habitual drunkenness for three years last past."

Sec. 513. Causes — Imprisonment in penitentiary.— It is not necessary that the imprisonment be for any particular length of time. It is said that the conviction must be final.² But the petition for divorce shall be filed during the imprisonment of the adverse party.³

Sec. 514. Petition on ground of imprisonment.—

[*Averments as in sec. 499.**]

Plaintiff says that on the — day of —, 18—, the defendant was convicted of the crime of — by the court of common pleas of — county, Ohio, and by said court sentenced to confinement in the penitentiary of said state for the term of — years, which said judgment and sentence is in full force and not reversed, and said defendant is now confined as a prisoner in the penitentiary of said state for said crime.

Sec. 515. Service.— If the defendant be a resident of the state, summons, with a copy of the petition, shall be served by the sheriff of the county in which he or she resides at least six weeks before the cause is heard.⁴ If the defendant is a non-resident or his residence is unknown, service must be made by publication as in other cases.⁵ If the residence is known to the plaintiff, a copy of the summons and of the petition shall be mailed to the defendant. This requirement can only be dispensed with by filing an affidavit that the residence of the defendant is unknown and cannot with reasonable diligence be ascertained.⁶ The publication of the notice may be made immediately upon the filing of the petition and affidavit without any order of court for that purpose. It would be much better to present the affidavit to the court, and have an order made upon the journal authorizing service by publication. Personal service may be made by an officer outside of the state.⁷ Service need not be made upon the filing of a cross-petition by the defendant.⁸

¹ Burns, 18 Fla. 869; Golding, 6 Mo. App. 602; 2 Bishop, M. & D., sec. 684b.

² Vinsant, 49 Ia. 689. See Cone, 58 N. H. 152.

³ O. Code, sec. 5689.

⁴ O. Code, sec. 5692.

⁵ O. Code, secs. 5693, 5048.

⁶ O. Code, sec. 5693.

⁷ Holland, 29 W. L. B. 98.

⁸ Young, 9 W. L. B. 24.

Sec. 516. Affidavit for service by publication.—

M. C., the plaintiff in the above-entitled action, being first duly sworn, says that this action is brought against the defendant J. C. in this court for divorce, according to the statute in such case made and provided; that the residence of the said defendant is to this plaintiff unknown, and that she has been unable by the exercise of reasonable diligence to ascertain the same; for that reason service of summons and a copy of the petition cannot be made in this state, nor is the said plaintiff able to mail a copy thereof to said defendant's place of residence.

NOTE—See form of legal notice in 1 Bates' Pldg., p. 423.

Sec. 517. Effect of foreign divorce.—It is settled law, supported by numerous authorities, that a decree of divorce granted in a state in which neither of the parties was domiciled is beyond the limits of such state and a nullity.¹ The question of the jurisdiction of the court is always open to inquiry, and a decree rendered without jurisdiction must necessarily be void.² The one domiciled in the state may ask for divorce and alimony notwithstanding the fact that the other has procured a divorce in another state.³ And in Ohio, where the wife has procured a divorce in another state, she may be allowed to return to the former state and file her petition for alimony and subject property of her husband to payment of the same.⁴ A divorce granted by the courts of another state without personal service when only the plaintiff is a resident of that state will not affect the property rights of the defendant.⁵

Sec. 518. Petition to nullify marriage with imbecile.—

The plaintiff, F. M. M., guardian of D. H., alleges the following facts, viz.: Said D. H. is an imbecile person, and has been an imbecile and feeble-minded from his birth, and is and has been wholly incapable to transact business or to make contracts for any purpose by reason of his imbecility and want of capacity to consent thereto.

¹ Van Fossen v. State, 37 O. S. 320; Watkins, 125 Ind. 163, and cases cited; Sewell, 123 Mass. 156; Cox, 19 O. S. 502; Hoffman, 46 N. Y. 80; Hood v. State, 56 Ind. 263; People v. Dowell, 35 Mich. 247; Litowich, 19 Kan. 451; Woods v. Waddle, 44 O. S. 449; 16 W. L. B. 357; 15 W. L. B. 232; 13 W. L. B. 4.

² Thompson v. Whitman, 18 Wall. 467; Van Fossen v. State, 37 O. S. 320, and cases cited.

³ Cox, 19 O. S. 502.

⁴ Woods v. Waddle, 44 O. S. 449.

⁵ Doerr v. Forsythe, 31 W. L. B. 48; 50 O. S. 726; Mansfield v. McIntyre, 10 O. 27; McGill v. Deming, 44 O. S. 645.

Plaintiff says that his said ward is the owner of certain lands situate in — county, Ohio, and particularly described as follows: [*Give description.*]

Said plaintiff further avers that his ward is in possession of a personal estate of — dollars in addition to the said real estate.

Plaintiff further avers that said ward has been under guardianship since he became possessed of said real and personal estate, and that on the — day of —, 18—, this plaintiff was duly appointed by the probate court of — county, Ohio, guardian of the person and estate of said imbecile, and thereupon duly qualified, and is now the duly acting and qualified guardian of the person and estate of said imbecile, as is fully shown by the records of the probate court of — county, Ohio.

Plaintiff says that heretofore, to wit, on the — day of —, 18—, without his knowledge and consent, and in fraud of the rights of said imbecile ward, he, the said imbecile, was taken to the state of —, away from his residence in this state, and not the residence of the defendant, and a pretended marriage was then attempted to be solemnized, whereby said imbecile should become the husband of the defendant, T. R. That said pretended marriage was brought about wholly by a fraudulent conspiracy on the part of the defendant and other persons unknown to this plaintiff, with the intention and for the purpose, as the plaintiff believes and charges, of securing some interest in or support from said imbecile's estate.

Plaintiff says that said imbecile was and is wholly and entirely incapable of contracting marriage, and that he had no capacity to consent thereto. That said pretended marriage is an absolute nullity, and should, for the protection of the estate of said imbecile, and of social order and public decency, be so declared by the court.

Plaintiff therefore prays that said pretended marriage be declared a nullity, absolutely void and of no effect, and that said defendant, T. R., be forever restrained from asserting any interest in or deriving any support from the estate of said imbecile, and for other relief to which he may be entitled.

NOTE.—From *Reynolds v. Moore*, Supreme Court, unreported, No. 1942. A marriage with one affected with congenital imbecility of mind so as to render him incapable of consent is void. *Waymore v. Jetmore*, 22 O. S. 271; *Wightman*, 4 Johns. Ch. 343; *Crump v. Morgan*, 5 Ired. Eq. 9. The guardian of such person may maintain an action to declare such pretended marriage void. *Id.*

Sec. 519. Petition to annul marriage with minor.—

That the plaintiff is now and has been a *bona fide* resident of the state of Ohio for the year last past, and a *bona fide* resident of the county of —.

That on the — day of —, 18—, the plaintiff was married to the defendant.

That at the time of said marriage the plaintiff was — years of age, and incapable, from want of age, of contracting said marriage contract.

That on the — day of —, 18—, the plaintiff separated from the defendant and repudiated said marriage, and they have not since cohabited or lived together as husband and wife.

[That the plaintiff's name at the time of her marriage was A. C.]

Wherefore the plaintiff prays that said marriage be declared void [and that she be permitted to resume her said former name].

NOTE.— There can be no marriage without consent, and a marriage when one lacks the capacity to consent is ineffectual and void *ab initio*. *Waymore v. Jetmore*, 22 O. S. 271.

Sec. 520. The answer.— A defendant may set up such defenses as he may have, and may file a cross-petition asking a divorce.¹ If the defense be a condonation, or if it be a recriminatory charge in bar, the same should be set forth,² although there are cases which hold that a defendant may prove any defenses under a general denial,³ excepting acts of adultery by way of defense, which must be pleaded with the same strictness as in the petition.⁴ The public being interested in divorce proceedings, if there are any defenses discovered, even though not pleaded, the same will not be granted.⁵ Mr. Bishop states the correct rule, as evidence may be introduced showing any facts, such as adultery, on the part of plaintiff, not entitling him to a divorce, whether an answer is filed or not.⁶

Sec. 521. Forms of answer.—

That the defendant denies each and every allegation of the complaint.

[*Or, in case of adultery*, That this cause of action was not commenced within two years after the plaintiff had discovered the offense charged in the petition.]

[*Or, in case of adultery*, That the plaintiff has voluntarily cohabited with defendant, with a full knowledge of the facts alleged in the petition.]

[*Or, in case of adultery*, That the offense of adultery charged in the petition was committed with the connivance and consent of the plaintiff.]

¹ Stewart, M. & D., sec. 340.

² Smith, 4 Paige, 482.

³ Backus, 8 Me. 136; Shackett, 49 Me. 195; Sickles v. Carson, 26 N. J. Eq. 440.

⁴ Pollock, 71 N. Y. 187; Tim, 47 How. Pr. 253; Mitchell, 61 N. Y. 398.

⁵ Bishop's M. & D., secs. 478-98, 612.

⁶ Id.

[*Or, in case of adultery*, That on the — day of —, 18— (and at various other times thereafter), the plaintiff committed the crime of adultery with one E. F.]

[*Or*, That since the bringing of this action the plaintiff and defendant have lived and cohabited together as husband and wife.]

[*Or*, That after the offense charged in the petition, the plaintiff, with a full knowledge thereof, voluntarily condoned such offense and forgave the defendant.]

Sec. 521a. Answer and cross-petition.—

Defendant admits that plaintiff and defendant were married on the — day of — 18—, and that there was born to them [*state children*], but denies each and every other allegation in said plaintiff's petition contained not hereinbefore admitted.

For answer and cross-petition defendant says that [*state any of the causes of divorce, as in ante, secs. 503, 507, 509, 511, 512, etc.*].

Sec. 522. The trial.—The cause may be heard and decided at any time after the expiration of six weeks from the service of summons or of the first publication of notice.¹ If the defendant does not appear, or, having appeared, admits or denies the allegations of the petition, the court shall proceed to hear and determine the cause; and if the evidence proves a cause, the court may pronounce the marriage contract dissolved.² If the petition does not state a cause, on objection by the defendant, the court may properly refuse to admit or hear any evidence, and if no amendment be made, the same may be dismissed.* The general reputation of the plaintiff must be shown, as it is an issue in the case, and the plaintiff should be prepared to both sustain and defend it, if attacked.³ Proof of cohabitation and reputation of the marriage of the parties shall be competent to prove marriage, and may be, in the discretion of the court, sufficient evidence thereof.⁴ A court cannot refuse to try a cause for divorce until costs incurred in other cases for divorce by the same plaintiff are paid.⁵ And in rendering a decree in favor of one entitled thereto, the court cannot require a petitioner to pay the costs as a condition precedent to the entry of the same.⁶

¹ O. Code, sec. 5694.

⁵ State ex rel. v. Miller, 8 O. C. C.

² O. Code, sec. 5695. As to evidence, see W. 212, 354, 632, 128, 156, 161, 514, 559, 454, 416.

10.

³ Harper, W. 283.

⁶ State v. Bates, 5 O. C. C. 18; Heffner v. Scranton, 27 O. S. 579. The entry is frequently held by clerks until costs are paid. This they have no right to do, but must put the

⁴ O. Code, sec. 5698; Lipe, 1 W. L. B. 164.

*Radcliff v. Radcliff, 15 O.C.C. 284.

Sec. 523. Custody of minor children.—The court may make such order respecting the disposition, care and maintenance of minor children as may seem to be just and reasonable.¹ The jurisdiction over the custody of minor children in divorce proceedings is a continuing one, and an order may be changed or modified as conditions and the best interests of the children may require.² So long as a decree in reference to the custody of a minor in divorce proceedings remains in force, the same cannot be interfered with by proceedings in *habeas corpus*.³ A mother who has been granted a divorce and awarded the custody of minor children, and who has been decreed alimony which did not include support for the minor children, may bring an original action against the father for the recovery of compensation for necessities furnished by her to such children in any other court than that in which the divorce was granted.⁴

Sec. 524. Petition by divorced wife against father for support of child.—

Plaintiff says that on or about the — day of —, 18—, she was married to the defendant; that the issue of said marriage was a son, A. J. P., who still lives and is now of the age of — years; that at the — term of the court of common pleas of the county of —, in the state of Ohio, 18—, such proceedings were had by such court, in a certain action for a divorce therein pending, in which action said plaintiff herein was plaintiff, and the said defendant herein was defendant, that in said action, on account of the misconduct, ill-treatment and neglect of the said defendant, by the judgment of the said court of common pleas this plaintiff was divorced from said defendant and awarded the custody, nurture, education and care of their said minor child, A. J. P. Plaintiff further says that ever since said decree of said divorce was entered this plaintiff and said defendant have lived separate and apart, and the said A. J. P., the minor son of the said defendant, has been boarded, clothed and cared for by this plaintiff, and that said boarding, clothing, care and attention

entry on, whether costs are paid or not. Under this rule it would seem that the clerk could not refuse to file a petition without a deposit.

¹ O. Code, sec. 5696.

² Hoffman, 15 O. S. 427; Rogers, 81 W. L. B. 118; s. c., 51 O. S. 1; Pfau, 8 O. C. C. 87. An appeal can-

not be taken in such an action, as an order requiring the father to pay a certain monthly stipend is not an order for the payment of alimony. Id.

³ Hoffman, 15 O. S. 427. See ch. 42,

sec. 653.

⁴ Pretzinger, 45 O. S. 452.

so furnished said son by the plaintiff herein were necessary and appropriate to his comfort and condition in life, and were of the value of not less than — dollars per year. That the said defendant is possessed of the following property [*describe the property*], is solvent, and well able to keep and support his said minor child. There is due and owing to plaintiff from the said defendant for said boarding, clothing and care aforesaid the sum of — dollars upon an account, a copy of which is hereto attached and marked Exhibit "A," in which said sum plaintiff asks judgment against the said defendant.

NOTE.— From Pretzinger, 45 O. S. 452.

Sec. 525. Allowance of alimony in divorce proceedings.—

If the divorce be granted by reason of the aggression of the husband, the wife may be allowed such alimony out of the husband's personal or real estate as the court deems reasonable. It may be allowed either in real or personal property.¹ Even where the divorce is granted by reason of the aggression of the wife, the court may adjudge to her such share of the husband's real or personal property as it deems just and reasonable.² Alimony may be allowed against a bigamist;³ and unless so stated in the decree, the subsequent marriage of the woman does not affect the allowance, except that it may furnish a ground for reducing the amount to a nominal sum.⁴ Real estate may be decreed the wife as alimony,⁵ and all the title which the husband had therein will by virtue of the decree be vested in her.⁶ The adequacy of alimony decreed cannot be collaterally questioned by a stranger, as by a person who is seeking to recover for necessities furnished the wife during the pendency of the proceedings.⁷ Such subsequent allowance may be made to the wife as the circumstances may seem to require.⁸ Alimony decreed to be paid in instalments may be enforced by execution for the instalments or any number of them as they become due,⁹ and the payment of alimony may be enforced by imprisonment where the de-

¹ O. Code, sec. 5699. For form of petition asking alimony, see *post*, 548; King, 38 O. S. 370, 372; Onley v. Watts, 43 O. S. 499.

sec. 527.

² O. Code, sec. 5700; Wolf, W. 248.

³ Vanvaley, 19 O. S. 538.

⁴ Lockwood v. Krum, 34 O. S. 1; Stillman, 99 Ill. 196; s. c., 9 W. L. J.

⁵ Broadwell, 21 O. S. 657.

⁶ Gallagher v. Fleury, 36 O. S. 590.

⁷ Hare v. Gibeon, 32 O. S. 33.

⁸ King, 38 O. S. 370.

⁹ Piatt, 9 O. 37.

fendant is able to pay the same.¹ But not if he is able to pay.² Even where there is no ground for divorce and the court finds it necessary to dismiss the petition, it may nevertheless allow the wife a reasonable sum as alimony where the parties are living apart,³ and she had good cause to leave her husband, and under the statute may in such case award the custody of a minor child to one of the parties.⁴ Alimony will be allowed where a divorce is decreed for a single act of adultery, where there is hope for reformation, upon the theory that it is not wise "to turn the wife loose to starvation and prostitution;"⁵ and so where a decree has been made on account of the fault of the applicant, where there is much provocation, and the parties are two contentious to live together,⁶ or where the decree is granted because of the willful absence of the husband,⁷ or where the wife has been abused and the abuse is forgiven but she is afterwards abandoned.⁸ Alimony will be allowed a woman asking for a divorce even where it appears that there has been a decree of divorce granted the husband in another state.⁹ In Ohio she may prosecute a suit for alimony though she has been granted a divorce in another state.¹⁰ A husband may not be entitled to a divorce where he has been guilty of adultery, yet he may not be obliged to render support to a wife who has means of her own.¹¹

Alimony can not be decreed in divorce proceedings where the defendant is a non-resident, and service of process is only obtained by publication.¹² This is so, even if the defendant has property within the jurisdiction.¹³ The property can not be affected by any order as to payment of alimony without personal service or appearance.

¹ Kaderabek, 3 O. C. C. 419; Hand, 25 W. L. B. 214; Stewart, 23 W. L. B. 38.

² Pancost v. Pancost, 15 O. C. C. 246.

³ Graves, 50 O. S. 196; 29 W. L. B. 256.

⁴ R. S. sec. 3140, Subd. 1 (Bates), *contra* Newell on Div., sec. 979.

⁵ Dailey, W. 514.

⁶ Bascomb, W. 632.

⁷ Amsden, W. 66.

⁸ Questel, W. 491.

⁹ Cox, 19 O. S. 502.

¹⁰ Woods v. Waddle, 44 O. S. 449.

¹¹ Meyer, 2 W. L. B. 48.

¹² Massey v. Stimmel, 15 O. C. C.

¹³ Bish. M. & D., sec. 9.

¹⁴ Bunnell v. Bunnell, 25 Fed. 214; Johnson v. Johnson, 31 Neb. 385; Wood v. Waddle, 44 O. S. 449; Dillon v. Starin, 63 N. W. 12; Massey v. Stimmel, 5 O. N. P. 29.

Sec. 525a. Injunction not necessary to hold property.

—Upon the filing of a petition for divorce in which alimony is asked, it is considered not necessary to have an injunction allowed preventing the disposal or incumbrance of real property where the property is described in the petition. And where third parties have an interest therein and are made parties they are likewise charged with notice. The ordinary rules of *lis pendens* applies. There can be no transfer or incumbrances.¹ Or a party owing the defendant money, if made a party defendant and served with process, is bound to hold the money to abide the final disposition of the case, without an injunction, the money being regarded as in the custody of the law.

Sec. 526. Proceedings for alimony alone.—A wife may prosecute a separate action for alimony, or she may file her cross-petition in suit for divorce commenced by her husband with or without a prayer for divorce when the husband has committed adultery, or any gross neglect of duty, or has abandoned her without good cause, or where there has been a separation in consequence of ill treatment on the part of the husband, or on account of habitual drunkenness, or imprisonment in a penitentiary.² She may maintain this action even though she has been granted an *ex parte* divorce in another state;³ and she need not be a resident of the state for any particular time to enable her to bring an action for alimony only.⁴ Where a wife obtains a divorce from her husband in Ohio, without a decree for alimony, and the husband is personally served with process, she cannot thereafter maintain a separate action against him for alimony.⁵

¹ Tollerton v. Williard, 30 O. S. 579; Fletcher v. Fletcher, 7 Oh. Dec. 605; 15 O. C. C. 271; Railroad Co. v. Brennan, 50 O. S. 589.

² O. Code, sec. 5702.

³ Woods v. Waddle, 44 O. S. 449.

⁴ O. Code, sec. 5690; Woods v. Waddle, *supra*; Lithowich, 19 Kan. 451.

⁵ Weidman v. Weidman, 57 O. S.

101.

Sec. 527. Petition for the recovery of alimony only.—

Plaintiff says that she has a *bona fide* residence in — county; that she was married to the defendant A. B. on the — day of —, 18—, at —. The following named children were born as the issue of such marriage: [*Names and ages.*]

Plaintiff says that she was married to the defendant A. B. on the — day of —, 18—, at —. The following named children were born as the issue of such marriage: [*Names and ages.*]

Plaintiff says that the defendant did on the — day of —, 18—, at — in the city of —, county of —, commit adultery with one —, etc. [*or state any grounds, as in R. S., sec. 570½.*]

The defendant is the owner in fee-simple of the following described property situate in the county of —, Ohio, to wit: [*Description, or if personal property describe it.*]

Plaintiff therefore asks for reasonable alimony for the support of herself and children and expenses during the pendency of this action, and that upon a final hearing of this cause the defendant be ordered and adjudged to pay her reasonable alimony out of his said property, and for such relief as is proper.

NOTE.—The residence need not be stated. O. Code, sec. 5690.

Sec. 528. Allowance of temporary alimony.—The court, or a judge in vacation, may, on notice to the opposite party of the time and place of the application, grant alimony to the wife for her sustenance and expenses during suit, and may also make an allowance to her for the support of their minor children during the pendency of such proceedings. It will be allowed to defray the expenses of the prosecution and maintenance until the termination of the suit upon affidavit making a *prima facie* case.¹ Alimony may be allowed by the circuit court during the pendency of an appeal, upon giving notice to the opposite party as in the action in the lower court.² The allowance of temporary alimony at chambers is a final order and may be prosecuted on error.³ When it is made to appear to a court, or a judge in vacation, that the husband is about to dispose of or incumber property so as to defeat his wife's right to alimony, the court may grant an injunction with or without bond.⁴ An order for temporary

¹ O. Code, sec. 5701; 91 O. L. 348.

² O. Code, sec. 5701.

³ Johnston, W. 454; Dorsey v.

⁴ King, 38 O. S. 370.

Goodenow, W. 120; Martin, W. 104; ⁵ O. Code, sec. 5701; Tolerton v.

Wooley, W. 245; Edwards, W. 308. Williard, 30 O. S. 579.

alimony does not create a debt within the meaning of the constitution providing against imprisonment for debt; hence payment may be enforced by attachment and punishment inflicted as for contempt for the willful refusal to comply with an order of the court.¹ But where it is made to appear that it is not within the power of the defendant to perform the order as to payment of alimony he can not be punished.²

Sec. 529. Petition by a divorced wife against her divorced husband's widow and heirs to enforce payment of decree for alimony against his real estate, and note.—

At the — term, 18—, of this court, the plaintiff obtained, by the judgment thereof, a judgment and decree of divorce from the bonds of matrimony, and for alimony, against A. M., then her husband. By said decree of alimony it was adjudged and ordered that the said A. M. should pay to the plaintiff, as alimony, the sum of — dollars — days after the close of said term, and the sum of — dollars annually, during her natural life, on the — of — in each of said years, and that if such sum should stand unpaid in either of said years for the period of ten days after being due and payable as aforesaid, execution should issue against said A. M. to satisfy the same, and that the real estate of said A. M., being [*description of lands*], should be held and charged with the payment of the aforesaid several sums of money, and that a lien should be, and was by said decree, created to secure the payment of the said several sums of money, on said real estate.

On or about the — day of —, 18—, the said A. M. died testate, and afterwards the defendant M. C. M., who is his widow, was appointed, by the probate court of this county, administratrix, with the will annexed, of his estate—the will of said decedent having been admitted to probate by said probate court. She accepted the appointment, gave bond as such, and entered upon and still continues in discharge of said trust.

After the rendition of said decree the said A. M. made payments upon the annual sums specified therein during his lifetime, and after they became due and payable.

But the sum of — dollars, payable according to said decree on the — of —, 18—, except the part thereof for the period up to, and sums of the same amount, payable according to said decree, annually during the life of the plaintiff, after said — day of —, 18—, have not, nor has either of them, been paid, in whole or in part, although those payable respectively on the — of —, 18—, and the — of —, 18—, and the interest on them respectively, after maturity, have each long since been due.

The defendant M. C. M. became the wife of said decedent after the rendition of said decree, and the defendants L. and

¹ Stewart, 23 W. L. B. 38; Ex parte Perkins, 18 Cal. 60; Haines, 35 Mich. 138; Musser v. Stewart, 21 O. S. 353. Proceedings in aid of execution is held a proper remedy to enforce payment of alimony awarded in gross. Hart v. Hart, 1 Oh. Nisi Pr. Rep. 56.

² Pancost v. Pancost, 15 O. C. C. 246.

R. M., C. F., E. H. and N. E. were given by said will certain pecuniary legacies, and to the other defendants said testator, in said will, devised all his property of whatever kind, subject to said pecuniary legacies. But whatever right of dower or other right the defendant M. C. M. may have in said real estate, and whatever lien, right, interest or claim the other defendants, or either or any of them, may have in said premises, any such right, title, claim or interest was created and acquired subsequent to the rendition of said judgment and decree of the plaintiff, and is subject and inferior to said decree which the plaintiff is entitled to have first paid and satisfied.

The plaintiff further says that as the divorced wife of said A. M., she, on the — day of —, 18—, in an action in this court in which all the defendants were also parties, duly served with process, obtained an assignment of her dower in said premises, which was made by the commissioners appointed for that purpose, as of one-third of the rents and profits of said premises, which was valued by them at \$— per year, which assignment and valuation the court approved, and ordered the same to be paid to her in two semi-annual payments of — dollars each, on the — of — and — of — of each year, during plaintiff's life, and that they should be a lien on said premises. Said lien is also superior to any title, claim or lien of the defendants, or either of them, on said premises. The said administratrix, although requested by plaintiff, has refused to pay said sums, or either of them, or any part thereof.

The defendants A. L. and C. M. are minors over the age of fourteen years, and the defendants S. and O. M. are minors under the age of fourteen years.

The plaintiff therefore prays that her said judgment and decree against A. M. may be revived against his said administratrix and widow, and the said devisees, under his will, of said real estate; that the priority of her said decree and lien be determined, and the amount due under said decree ascertained; and for a judgment and order for sale of said premises to pay the same, and for other proper relief.

NOTE.—From *Marchand v. Marchand*, Supreme Court, unreported, No. 1848.

Decree a lien on real estate.—A decree for alimony payable in instalments to become a lien must be so stated in the decree. *Olin v. Hungerford*, 10 O. 369. See *Tolerton v. Williard*, 80 O. S. 579. But a decree payable in gross operates *per se* as a lien upon real estate of husband in the county where the same is rendered. *Conrad v. Everich*, 50 O. S. 476; s. c., 30 W. L. B. 294; 4 O. C. C. 231. See *Webster v. Dennis*, 4 O. C. C. 315. It may be enforced against a third person to whom the premises have been transferred subsequent to the rendition of the decree. *Id.* All sums ordered paid at once become general liens without being so expressed. *Kurtz v. Kurtz*, 38 Ark. 119. See R. S., secs. 5810, 5875, 5697, 5708. The claim for alimony rests

Sec. 529a. Power of court to afterwards change amount of alimony decreed.—The jurisdiction of the court over alimony is of a continuous nature when a decree has been entered, at least where the amount is payable in installments. The court may review, modify or vacate a former decree granting alimony payable in installments at the term when rendered or at a subsequent term. The court, however, can not be called upon to retry matters which were once adjudged, but there must be new circumstances or changed conditions furnishing some reason why the decree should be modified.¹ The writer would not undertake to say that this would be done in cases other than where the alimony is to be paid in installments, that is, in a gross sum. A decree in gross becomes a lien upon property and must be paid, and is not continuing like one payable in installments. This will all depend upon the form of the decree.

The procedure for obtaining a review or modification of such a decree should be by an original petition and suit, setting forth the changed conditions. This may be tested by a demurrer.²

on the common-law liability of husband to support the wife. *Lockwood v. Krum*, 84 O. S. 1. A judgment for alimony creates a debt of record. *Chase v. Chase*, 105 Mass. 385. Judgments for alimony stand on same footing as other judgments for money. *Frakes v. Brown*, 2 Blackf. 295; *Keyes v. Scanlan*, 63 Wis. 845. A lien cannot be declared on real estate situate in a county other than where the decree is rendered. *Wilmot v. Cole*, 23 W. L. B. 339. A decree for alimony like an ordinary judgment will become dormant unless kept alive by executions. *Mullane v. Folger*, 21 W. L. B. 277. On decreeing a wife a separate maintenance, the court may make its decree a lien on the husband's realty and award execution for the collection of the instalments as they become due. *Johnson v. Johnson*, 125 Ill. 510.

¹ *Olney v. Watts*, 43 O. S. 499; *Law v. Law*, 15 O. C. C. 409; 2 *Bishop's M. & D.*, sec. 429.

² *Olney v. Watts*, 43 O. S. 499.

CHAPTER 38.

DOWER.

Sec. 530. Action for dower.

531. Petition by widow.

532. Incumbrances may be presented by cross-petition.

533. Proceedings generally.

Sec. 534. Petition to discharge land of dower of insane person and proceedings thereunder.

535. Petition by widow for the enforcement of judgment for dower.

Sec. 530. Action for dower.— A widow or widower may file a petition for dower in the court of common pleas against the heir or other person having the next immediate estate of inheritance, or any other estate or interest therein, which petition should set forth the right thereto and describe the tracts of land in which dower is claimed; such judgment should be made as appears just and consistent with the rights of all the parties interested therein.¹ A proceeding to assign dower is regarded as a civil action.²

Sec. 531. Petition by widow.—

Plaintiff says that on the — day of —, 18—, she was married to J. A. C., who died on the — day of —, 18—.

The said J. A. C., her late husband, during her coverture with him, was the owner of and seized of an estate of inheritance in the following real estate, situate in the county of — state of Ohio, to wit: [*Describe property.*]

The defendant A. B. now claims to hold the estate of the said J. A. C., deceased, in said premises.

The plaintiff says that she is entitled to dower in said premises as the widow of the said J. A. C., deceased.

The plaintiff prays that her reasonable dower in said premises may be decreed her, and that an assignment thereof be made, and for such further relief as equity requires.

NOTE.— From *Corry v. Lamb*, 48 O. S. 390; O. Code, sec. 5707. Dower is allowed only to widow or widower who is the wife or husband at the time of the death. *Rice v. Lumley*, 10 O. S. 596. A wife divorced for the aggression of the husband, even though remarried, is entitled to dower. *Lampkin v. Knapp*, 20 O. S. 454; O. Code, sec. 5699; *Arnold v. Donaldson*, 46 O. S. 73. She is entitled to dower in what. 16 O. S. 193; 28 O. S. 503; 40 O. S. 391; 8 O. S. 324; 1 Disn. 121; 21 O. S. 509; 27 O. S. 464; 39 O. S. 173; 12 W. L. B. 90; 2 W. L. B. 92; 2 O. C. C. 188. Dower is barred by adultery and divorce by wife's aggression. R. S., sec. 4192.

¹ O. Code, sec. 5708.

² *Corry v. Lamb*, 48 O. S. 390.

Sec. 532. Incumbrances may be presented by cross-petition.— Any person who has any claim as a lien-holder or otherwise upon the premises in which dower is sought to be established may set forth the same in an answer and cross-petition, and such rights and lien shall be regarded by the court.¹

Sec. 533. Proceedings generally.— If the land in which dower is sought lie in several counties, the petition may be filed in any county wherein a part of the same is situate, and the court of common pleas of such county shall have complete jurisdiction and may order the whole of such dower to be assigned in any one or more of such counties and out of any one or more of such tracts, if the same can be done without prejudice to the rights of any person who may have a lien thereon.² If the plaintiff die before the assignment has been made or before final judgment, the action may, under the statute, be revived in the name of the personal representative.³ A decree may be rendered for a sum equal to one-third of the rental value of the real estate of which she would have been dowable had she lived, from the time of filing the petition until her death, after deducting one-third of the expenses.⁴ Three disinterested men of the county in which the action is brought shall be appointed commissioners to set off and assign the dower in the manner set forth in the judgment.⁵ If the court approve the assignment made by the commissioners, the same shall be entered upon the records and execution shall issue to put the widow or widower in full possession.⁶ If a division cannot be made by metes and bounds, dower shall be assigned as of a third part of the rents and profits.⁷ In partition proceedings, or in any action or proceeding wherein the court may order the sale of real estate to satisfy any judgment or decree, a widow or widower having a dower interest therein, being a party, may file an answer and waive the assignment of dower by metes and bounds and have the same sold free of such dower, and have allowed in lieu

¹ O. Code, sec. 5709.

² R. S., sec. 5710.

³ O. Code, sec. 5711.

⁴ McGill v. Deming, 44 O. S. 645-661; O. Code, sec. 5711.

⁵ O. Code, sec. 5712. See as to what shall be taken into consideration by commissioners, Larrowe v.

Beam, 10 O. 498; Dunseth v. Bank, 6 O. 77; Allen v. McCoy, 8 O. 417.

⁶ O. Code, sec. 5713.

⁷ O. Code, sec. 5714. As to the assignment of dower during pendency of action, see sec. 5715. Improvements must be included in estimating yearly value (R. S., sec. 5716).

thereof such sum of money out of the proceeds of the sale as to the court may seem the just and reasonable value of such dower.¹ And even though a widow has not filed an answer in the action, her interest, if manifest, will be protected by the court.² If dower has been allowed out of the proceeds of a sale, the widow is thereby estopped from claiming dower in the land sold.³ An answer of a widow or widower shall have the same effect as a deed of release of dower to the purchaser.⁴ A guardian of an insane widow or widower may make an election.⁵

Sec. 534. Petition to discharge land of dower of insane person and proceedings thereunder.—Any person who owns real estate which is incumbered by a contingent or vested right of dower of an insane person may file a petition in the court of common pleas of the county in which such real estate is situate, making such insane widow, husband, wife, or guardian defendant thereto, asking to have the property sold and discharged and unincumbered of such dower. The petition should set forth the insanity of the person, together with a description of the land proposed to be sold. A committee of six men should thereupon be appointed, of whom at least three are physicians, whose duty it shall be to inquire into the fact of such insanity; and if such committee reports that such person is permanently insane, the court shall appoint three judicious freeholders to appraise the real estate.⁶ The court may, upon the filing of the report of such committee, order the petitioner to convey to the insane person, to be held by her in fee, such portion of the real estate as shall seem to the court just and proper, or the court may decree to such insane person, to be held during life, after the death of the husband or wife of such insane person, such portion of the real estate described in the petition as shall seem necessary for the support of such insane person. Or the court may order the petitioner to invest a fixed amount in stocks, the profits and dividends arising therefrom to be applied to the support and maintenance of such insane person after the death of the husband or wife of such insane person. Upon compliance with the order

¹ O. Code, sec. 5719.

² McDonald v. Aten, 1 O. S. 293.

³ Sweetey v. Shady, 22 O. S. 333.

⁴ O. Code, sec. 5720.

⁵ O. Code, sec. 5721.

⁶ O. Code, sec. 5722.

of the court the petitioner may sell all of the real estate free and unincumbered of the dower of such insane person.¹

Sec. 535. Petition by widow for the enforcement of judgment for dower.—

Plaintiff says that she is the widow of J. S., who died at D. in the county of —, Ohio, on the — day of —, 18—. That her said deceased husband, J. S., and the said M. S. were the owners in common of the following described real estate situate in the city of D., Ohio, to wit: [*Describe property.*]

That at the time of the death of her said husband, J. S., he was the owner and seized in fee-simple of the undivided half of said premises, and left the defendant A. S. as his sole heir and the plaintiff as his widow. On the — day of —, 18—, the said M. S. filed his petition in the court of common pleas of — county, Ohio, against the said A. S. and this plaintiff for a partition of the said premises, and for the assignment of dower to this plaintiff as the widow of said J. S., deceased; and that such proceedings were had that on the — day of —, 18—, the said court found that the said M. S. and J. S. were respectively seized of an undivided half of said premises, and that this plaintiff was entitled to dower in the share of said J. S., and thereupon ordered partition of premises to be made, and that the dower of the said plaintiff be assigned by metes and bounds, if practicable, otherwise as of the rents and profits; that such proceedings were had that the dower interest of this plaintiff was estimated at — dollars per year during her natural life, and said amount was duly assigned in said proceedings to this plaintiff, which said assignment was approved and confirmed by the court. That in pursuance of an order made by said court in said proceedings, the said premises were sold to the said M. S. subject to the dower interest of this plaintiff in the sum of — dollars per year, and that the said M. S. thereupon entered into the possession of and has owned the said premises since that date, and plaintiff says that the following instalments of said dower have not been paid, amounting to the sum of — dollars: [*Here give the instalments.*]

That said dower interest is a lien upon the said premises, and the said M. S. as the owner thereof is a trustee for the payment thereof.

Wherefore plaintiff prays that the said M. S. may be adjudged and decreed to pay the sum of — dollars, being the aggregate of said annual instalments, with interest from the dates when the same respectively became due, and that in default of such payment the said real estate be sold as upon execution, and that the plaintiff be paid the amount so to be adjudged to her with interest, and for such other relief as may seem proper.

¹ O. Code, sec. 5724.

CHAPTER 34.

ELECTION CONTESTS.

Sec. 536. Contest for county offices.	finding and decision of
537. Notice of appeal in contest	canvassing board as to
for county office.	result of election.
538. Hearing of contest.	Sec. 541. Answer of contestee.
539. Contests of election of state	542. Reply of relator.
and judicial officers.	543. Precipe for notice of appeal.
540. Petition on appeal to the	544. Notice of appeal to be issued
supreme court from the	by clerk.

Sec. 536. Contest for county offices.—The method of contesting the election of county officials is pointed out by statute in Ohio. The right is given to any elector of a county by an appeal to the court of common pleas of the county from the decision of a board of deputy supervisors of election. The contestor must file a notice of such appeal with the clerk of court, and must himself give notice to the contestee on or before the thirtieth day after the day of election.¹ The appeal must be properly perfected within the prescribed time to give the court jurisdiction,² which dates from the declaration of the election by the proper officials.³ It is not essential that the notice contain facts sufficient to constitute a good case for the contestor,⁴ but only the grounds, or, as interpreted by the court, the "points" accurately stated, so as to apprise the contestee of the nature of his objections.⁵ It must show that the contestor was either a candidate or an elector.⁶ The manner of contesting elections is purely statutory, and the mode there prescribed is exclusive; *mandamus* will not lie to compel a recanvass of the vote.⁷ It is a statutory proceeding, no right to the prosecution of which was known to the com-

¹ R. S., sec. 2997.

² *Ingerson v. Marlow*, 14 O. S. 568.

³ *Taylor v. Wallace*, 81 O. S. 151.

⁴ *Howard v. Shields*, 16 O. S. 184.

⁵ R. S., sec. 2997; *Howard v. Shields*,
supra.

⁶ *Edwards v. Knight*, 8 O. 375. See

Kiehborth v. Bernard, 2 W. L. B. 171; *Straub v. Wilson*, 2 W. L. B. 153.

⁷ *State v. Marlow*, 15 O. S. 672;
State v. Simpson, 5 W. L. B. 422;

Ingerson v. Berry, 14 O. S. 315.

mon law. All agree that the questions are public or political, in which the people are the real parties in interest.¹ But it is said that the remedy by contest is one belonging to the individual, and that it does not oust the jurisdiction of the proper court to inquire into the authority of any person assuming the functions of a public office by proceedings in *quo warranto*.² In the trial of contested election cases for county officials the general rules of evidence are applicable.³ The whole subject-matter is transferred to the court, whose duty it is to correct all errors, frauds and mistakes.⁴

Sec. 537. Notice of appeal in contest for county office.—

This day comes A. B., who was a candidate for office of sheriff of — county, Ohio, at the election held in said county on the — day of —, 18— [or, an elector of the county of —, *etc.*], and files this his written notice that he has appealed to the court of common pleas from the finding and decision of the board of deputy supervisors of election of — county, Ohio, of the result of the election of a sheriff in said — county, Ohio, held on said — day of —, 18—.

NOTE.—R. S., sec. 2997. A complete copy of the notice to be served on the contestee may be found in *Howard v. Shields*, 16 O. S. 186.

Sec. 538. Hearing of contest.—The parties may file a motion to have the case taken up and have any matter relating to the contest determined; otherwise it will be heard in the regular order on the docket.⁵

Sec. 539. Contests of elections of state and judicial officers.—The legislature of Ohio has very wisely removed contests of election of state and judicial officers from the higher branch of that body and transferred it to the judiciary. It is provided that contests of election of common pleas and superior court judges shall be had by an appeal from the finding and decision of the canvassing board declaring the result of such election to the circuit court of the county in which the contestee resides.⁶ The supreme court is given exclusive jurisdiction over the contest of elections of all circuit court judges, supreme court judges, and of all state officers.⁷ The

¹ *State v. Harmon*, 81 O. S. 250; ⁵ R. S., sec. 3002. As to method of State ex rel. v. Stewart, 26 O. S. 216; procedure, consult sec. 2998 et seq. Paine on Elec., sec. 420. of statutes.

² Paine on Elec., sec. 300.

⁶ 69 O. L. 363, sec. 1.

³ *Sinks v. Reese*, 19 O. S. 306.

⁷ 69 O. L. 364, sec. 6.

⁴ *Ingerson v. Berry*, 14 O. S. 815.

law conferring this power was attacked in the supreme court, in the only case brought under it so far—William T. Wear against Charles O. Shearer, a contest of the election of circuit judge, upon a motion to dismiss the proceeding upon the ground that the supreme court had no jurisdiction of the subject-matter for the reason that the law conferring the same was unconstitutional, as granting original jurisdiction upon that court not permitted by the constitution. The constitution provides that the supreme court “shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, and such appellate jurisdiction as may be provided by law.”¹ The law in question requires the court to hear the case upon depositions, and to determine the contest in a summary manner.² It may be true that it requires the court to act in reference to matters which partake of the nature of original jurisdiction, as it must hear evidence and render judgment. But there is another provision of the constitution which permits the general assembly to determine by law before what authority and in what manner the trial of contested elections shall be conducted.³ It was also urged in support of the motion to dismiss in this case that there can be no appeal to the supreme court except from the finding and judgment of a judicial tribunal; and yet the provision of the constitution already quoted: “and such appellate jurisdiction as may be provided by law,” is very significant. Suffice it to say that the motion to dismiss for want of jurisdiction was overruled, thus giving evidence that the supreme court was sufficiently satisfied of the constitutionality of the law to entertain the contest. The case, however, was never heard upon its merits.⁴ The mode of procedure under this law is sufficiently outlined in the forms following, which may be modified to meet the requirements of a case where the contest is brought in the circuit court.

¹ Art. 4, sec. 2, Const.

² 89 O. L. 364.

³ Art. 2, sec. 21, Const.

⁴ The motion was in fact overruled upon the ground that the court considered that under article 2, section

21, of the constitution, the legislature had power to confer the hearing of contests of election on the supreme court, and expected to report the case when heard upon its merits, but it was settled.

Sec. 540. Petition on appeal to the supreme court from the finding and decision of canvassing board as to result of election.—

IN THE SUPREME COURT OF THE STATE OF OHIO.

The State of Ohio ex rel. Will-
iam T. Wear, Plaintiff,

vs.

Charles C. Shearer, Defendant.

To the Honorable the Supreme Court of the State of Ohio:

And now comes W. T. W., the relator herein, and shows to the court that he is an elector of the county of Champaign, state of Ohio, which county is in the second judicial circuit of said state, and that he was such elector on the — day of November, 18—, and as such had a right to vote at the election held on said day for any candidate for judge of the circuit court of the said second judicial circuit; he further says that he files this relation and brings this proceeding by way of appeal from the finding and decision of the board of deputy supervisors of election of Franklin county, Ohio, which county is the county in said judicial circuit having the greatest population, and which board of deputy supervisors is the canvassing board which finds and declares the result of the election of circuit judges of the said judicial circuit; and your relator further states that at such election there was one circuit judge to be elected for said judicial circuit, and there were two candidates for said office, viz.: Charles O. Shearer, who was the republican candidate, and Frank Chance, who was the democratic candidate, and who was also the candidate of the people's party, and on the — day of —, 18—, said canvassing board found and declared that the contestee herein, Charles C. Shearer, had received at such election for said office twenty-five votes more than the said Frank Chance, a copy of which finding and declaration is hereto attached, marked "Exhibit A," and your relator hereby and herein appeals from such finding and declaration for the reasons following, viz.: In the county of Fayette, in said circuit, twenty-one (21) votes were cast for F. C. for the said office by electors voting the people's party ticket, none of which were counted for him, to wit: Eleven (11) votes in western precinct, Union township, etc.

And in the county of Darke, in said judicial circuit, fifteen (15) votes were legally cast for the said F. C. for the said office in — precinct, and other voting precincts of said county, that were not counted for him, but all of which ballots were sealed and sent up to the board of deputy supervisors of

elections of said county and who now have the same in their possession.

And your relator further states that in their finding of the aggregate vote cast for the said S. and C. respectively at said election, the said board of deputy supervisors of elections of Franklin county included and counted in the vote for the said C. C. S. the thirty-five (35) illegal votes so cast for him as aforesaid in Greene and Champaign counties, and did not include or count in the vote for said F. C. the lawful votes so as aforesaid cast for him in Fayette, Clark, Greene and Darke counties; and your relator states that the said F. C. received at said election a majority of all the lawful votes cast for the said office of circuit judge for the second judicial circuit and was duly elected to said office.

Wherefore your relator prays that the finding and declaration of the board of deputy supervisors of elections of Franklin county may be reviewed and inquired into and set aside and held for naught, and the said F. C. held and declared to be duly elected to said office, and that the court make such order or decree and award such process as may be proper and necessary in the premises.

D. C. J.,

Attorney for Relator.

THE STATE OF OHIO, }
 } ss.
 — County.

W. T. W., the plaintiff, being duly sworn, says that the statements in the foregoing pleading are true as he verily believes.

W. T. W.

[*Jurat.*]

NOTE.—From *Wear v. Shearer*, filed in supreme court.

Sec. 541. Answer of contestee.—

[*Caption.*]

Now comes the respondent, C. C. S., and for his answer herein denies that at the election for circuit judge in the second judicial circuit of the state of Ohio, held on the — day of —, 18—, said F. C., the relator herein, was the candidate of the people's party for circuit judge for said judicial circuit.

The respondent further denies that in said county of — any votes were cast for said F. C. for circuit judge for said circuit by electors voting the people's party ticket which were not counted for him; he denies that in said county of Clarke any votes were lawfully cast for said Chance for said office which were not counted for him; he denies that in said county of Champaign there were counted for said C. C. S. any votes that were not cast for him; he denies that in said county of Greene any votes were lawfully cast for the said F. C. for the

said office by electors voting the people's party ticket which were not counted for him.

[Such defenses as the contestee may have, may be stated in addition to formal denials as above.]

Wherefore this defendant prays that this proceeding may be dismissed, and that he recover his costs herein expended.

H. J. B.,
G. K. N.,
F. A. D.,

Attorneys for Respondent.

NOTE.—From *Wear v. Shearer*, Supreme Court.

Sec. 542. Reply of relator.—

And now comes the relator, and for reply to the first defense in the answer of the defendant, C. C. S., set out, avers that in fact and in law said defense is but a general denial of the statements of the relator's petition, but the relator denies each and every statement contained in and set out in said defense contradictory to and inconsistent with the statements of the relator's petition.

And for reply to the second defense in the respondent's answer set out, the relator denies each and every statement therein contained, except the statement that the boards of deputy state supervisors in said several counties composing the second judicial circuit, returned to the deputy state supervisors of elections of Franklin county one thousand six hundred and forty-five votes cast for F. C. for judge of the circuit court for said circuit, and which were cast for him by electors voting the people's party ticket. And the relator, for further reply to the second defense, etc. *[make specific demands or set out defenses]*.

And by way of reply to the tenth defense in the answer of the respondent contained and set out, the relator says that he denies each and every allegation thereof.

Wherefore he prays as in his petition herein he has prayed.

D. C. J.,
L. D. J.,

Attorneys for Relator.

NOTE.—From *Wear v. Shearer*, Supreme Court.

Sec. 543. Precipe for notice of appeal.—

[Caption.]

To Clerk of Supreme Court:

Please issue notice of appeal in the above-entitled case, together with a copy of the relation, directed to the sheriff of — county, Ohio, and serve the two copies on the contestee, C. C. S., in the same manner as a summons, but to be served within five days from —, 18—.

D. C. J.,

Attorney for Relator.

NOTE.—89 O. L. 864, sec. 8.

Sec. 544. Notice of appeal to be issued by clerk.—**SUPREME COURT OF OHIO.**

The State of Ohio, }
City of Columbus. } ss.

To the Sheriff of ——— County, Greeting:

You are commanded to notify C. C. S. that W. T. W., an elector having a right to vote for any candidate for judge of the ——— court, etc.,¹ has filed a petition in appeal from the finding and decision of the canvassing board upon the result of the election of circuit judge in the ——— judicial circuit of Ohio, in the nature of a relation against him in the supreme court of the state of Ohio; and that he is required to answer to said relation within fourteen days from the day of service of this notice upon him. A copy of said relation and the exhibit therein referred to is furnished herewith to be served upon him.

You will make due service and return this writ within five days from the date hereof.

Witness my name and the seal of said supreme court, etc.

NOTE— 89 O. L. 864, 865, sec. 8.

¹89 O. L. 864.

CHAPTER 35.

EXECUTORS AND ADMINISTRATORS.

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|---|---|
| Sec. 545. Pleading representative capacity. | Sec. 552. Actions against executor or administrator individually. |
| 546. Averment of appointment of executor. | 553. Actions on rejected claims. |
| 547. Form of allegation of appointment of administrator. | 554. Petition against executor or administrator on rejected claim. |
| 548. Statutory actions by executor or administrator. | 555. Petition on unpaid claim allowed. |
| 549. Action by executor or administrator to complete contract. | 556. Defenses to actions on claims. |
| 550. Action to set aside fraudulent sale of real estate and to sell same to pay debts. | 557. Actions to set aside erroneous or fraudulent settlements. |
| 551. Petition to set aside fraudulent conveyance and for sale. | 558. Actions for recovery of distributive share. |
| | 559. Petition for recovery of distributive share. |

Sec. 545. Pleading representative capacity.—It is a rule too well settled to warrant the citation of authority that representative capacity is a traversable fact. Yet it is surprising, upon an examination of pleadings contained in cases which have reached the court of last resort, at the lack of uniformity in practice. In the more populous places, where every inch of ground is fought, the rule is uniformly observed. In other places no objections are made, and hence there are frequent violations of the rule. Every fact necessary to show that the appointment has been duly made should be set forth, and it should be shown with reasonable certainty that the remedy is sought in a representative capacity.¹ In alleging representative capacity of an executor, the fact and date of the death of

¹ *Neil v. Cheney*, 1 W. L. M. 155; See *Stilwell v. Carpenter*, 63 N. Y. Sheldon v. Hoy, 11 How. Pr. 11; 639; *Dayton v. Connah*, 18 How. Pr. Forrest v. Mayor, 18 Abb. Pr. 350; 826. *Kingsland v. Stokes*, 58 How. Pr. 1.

the testator should be stated; that he left a will in which the plaintiff or defendant was named as executor; that the will of the testator was duly probated, giving the date of the issuance of letters testamentary, and that the plaintiff or defendant has duly qualified and entered upon the duties of such executor.¹ In alleging the representative character of an administrator, it is held to be sufficient if the petition shows that the plaintiff filed an application for letters of administration at a certain time in a designated court, and that such proceedings were had, that he was duly appointed and qualified and that letters of administration were issued to him.² Merely giving the name of the administrator in the commencement of the petition, and attaching the words "administrator of C. D., late of —, deceased," being descriptive only, is therefore insufficient.³ Even though the requirements of the statute have not been complied with as to the giving of a bond, a judgment against the administrator will not be vacated on that account.⁴ Under an allegation that a person has been appointed administrator by proper authority, it will be presumed as against a demurrer that he has taken the necessary steps to secure the appointment.⁵ Where a petition shows that property has been in charge of two administrators, the letters of one of whom have been revoked, the petition should state the fact of such revocation.⁶ The omission of the word "as," between the name of the plaintiff and the words descriptive of his representative capacity, is not fatal.⁷ At common law the issue of representative capacity could be raised only by plea in bar or abatement. The rule remains the same under the code, it being necessary to state the facts

¹ *Kirsch v. Derby*, 96 Cal. 602; *Hurst v. Addington*, 84 N. C. 148; *Barfield v. Price*, 40 Cal. 585; *Hall v. Mixer*, 16 Cal. 574.

² *Monroe v. Dredging Co.*, 84 Cal. 515; s. c., 18 Am. St. Rep. 248.

³ *Sheldon v. Hoy*, 11 How. Pr. 11. The time and mode of appointment should be given so as to enable the adverse party to take issue thereon. *Dayton v. Connah*, 18 How. Pr. 820. An allegation that the intestate died,

that the plaintiff was duly appointed his administrator and qualified, is held sufficient to show that the administrator was suing in representative capacity. *Quinn v. Newport News Co.*, 22 S. W. Rep. 223 (Ky., 1893).

⁴ *Mitchell v. Albright*, 20 W. L. R. 101; *Slagle v. Entekin*, 44 O. S. 687.

⁵ *Gutridge v. Vanatta*, 27 O. S. 366.

⁶ *State v. Green*, 65 Mo. 528.

⁷ *Beers v. Shannon*, 78 N. Y. 292.

relied upon to show that the averment is not true.¹ The proper method of reaching a defect in an allegation of representative capacity is by motion.²

Sec. 546. Averment of appointment of executor.—

Plaintiff says that J. K. died on the — day of —, 18—, leaving a last will and testament, which said will was duly filed and admitted to probate by the probate court of — county, Ohio, on the — day of —, 18—.

That said will named plaintiff as the executor thereof, and that he was appointed by the said court on the — day of —, 18—, as executor of the said last will and testament of the said J. K., deceased, and is now the duly qualified and acting executor of the said will of said J. K., deceased, and brings this suit as such executor.

NOTE.—Modeled from *Kirsch v. Derby*, 96 Cal. 602.

Sec. 547. Form of allegation of appointment of administrator.—

Where plaintiff:

Plaintiff states that on the — day of —, 18—, C. D., late of the county of — and state of Ohio, died intestate; that on the — day of —, 18—, this plaintiff was appointed by the probate court of said county as administrator of the estate of the said C. D., deceased, and is now the duly qualified and acting administrator of such estate, and brings this action as such administrator.

Where defendant:

That on the — day of —, 18—, C. D., late of the county of —, state of Ohio, died intestate; that on the — day of —, 18—, the defendant E. F. was by the probate court of said county duly appointed administrator of the estate of the said C. D., deceased, and is now the duly qualified and acting administrator of such estate, and this action is brought against him as such administrator.

Sec. 548. Statutory actions by executor or administrator.—The statutes authorize an executor or administrator to maintain an action upon a contract made by his decedent without joining with him the person for whose benefit it is prosecuted;³ or an action against a former executor or ad-

¹ *Mayes v. Turley*, 60 Iowa, 407; 28 Barb. 591; *Neil v. Cheney*, 1 W. L. Ewen v. Railway Co., 88 Wis. 614. M. 155.

Contra, *Gilmore v. Morris*, 18 Mo. App. 114.

² *Jewett v. Fairchild*, 4 Denio, 88; 18 How. Pr. 418; *Bangs v. McIntosh*,

³ R. S., sec. 4995. See *ante*, sec. 9. The holder of a note payable to bearer may be sued by an administrator in his own name, although it

ministrator,¹ though this does not authorize an administrator *de bonis non* to sue the administrator of his predecessor, who died in office;² or an action for the sale of real estate to pay debts either in the probate or common pleas court;³ or an action against another for wrongfully causing the death of the decedent;⁴ or a civil action against creditors, legatees, distributees or other parties, to determine questions with respect to the administration of a trust imposed;⁵ or an action against a former executor or administrator upon his bond for any maladministration of such administrator or executor;⁶ or an action for the foreclosure of a mortgage made to his decedent.⁷ A foreign executor or administrator is authorized to prosecute an action in the state in the same manner as a non-resident is permitted to sue.⁸

Sec. 549. Action by executor or administrator to complete contract.— If an executor or administrator so desires, he may file a petition in the court of common pleas of the county in which the land is situate, for the completion of any contract entered into by a decedent for the sale or conveyance of an interest in land, which has not been completed before the death of such decedent.⁹ An executor may carry out a contract made by his testator, in a lease which had not expired at his death, to pay for certain buildings which the tenant was allowed to erect, by allowing the necessary sum to cover the value of such building and any damages that may accrue to the tenant.¹⁰ The specific performance of a contract made by an intestate for the erection of a dwelling-house,

belongs to the estate of which he is administrator. *Holcomb v. Beach*, 112 Mass. 450. Possession of such note is evidence of title. *Pettee v. Prout*, 8 Gray, 502. An executor may sue either in his own name or as executor, upon a note given him as executor, for a debt due the testator at the time of his decease. *Merritt v. Seaman*, 6 N. Y. 168.

¹ R. S., secs. 6020, 6214; *ante*, secs. 354, 358.

² *Herckelrath v. Van Nes*, 31 W. L. B. 35 (C. S. C. R., 1898), citing *Bliz-*

zard v. Filler, 20 O. 479; *Curtis v. Lynch*, 19 O. S. 392-399.

³ R. S., secs. 6137, 6136, 6141.

⁴ R. S., sec. 6134; *Weidner v. Rankin*, 26 O. S. 522. See chapter 63, Negligence Causing Death.

⁵ R. S., sec. 6202. See chapter 92, on Wills.

⁶ R. S., secs. 6020, 6051. See chapter 23, on Bonds; R. S., sec. 6214.

⁷ R. S., secs. 6070-72.

⁸ R. S., sec. 6133.

⁹ R. S., sec. 5800.

¹⁰ *Jackson v. O'Brannin*, 14 O. S. 177.

which was not intended as an improvement of the realty as an investment, cannot be enforced against the executor in favor of the heirs.¹ The personal representative may rescind or perform any personal contract of the decedent as the best interest of the estate may seem to demand, subject to the approval of the court.² An independent contract made by an executor to sell his decedent's real estate to the purchaser at a price less than that agreed upon by the testator, under a power of sale granted him by the will, cannot be enforced against the executor although he might be wholly responsible in damages.³

Sec. 550. Action to set aside fraudulent sale of real estate and to sell same to pay debts.— Where land has been fraudulently sold by the decedent during his life-time, an executor or administrator may, if it becomes necessary to sell the same to pay debts, bring an action for the recovery of the possession thereof, and to have the same set aside on the ground of fraud, and sold for the payment of debts due from the decedent.⁴ As in other cases, the petition must set forth the amount of debts, charges of administration, and the value of the personal estate.⁵ All persons who hold or claim to hold any interest under and by virtue of such fraudulent conveyance should be made parties to the action.⁶ An action cannot be maintained by an administrator against his decedent's grantee in possession to recover the value of real estate held by the latter for the payment of debts, upon the ground that the decedent conveyed it during his life-time in fraud of creditors. The proper remedy in such cases is to bring a civil⁷ action under the code to set aside the fraudulent conveyance and subject the land to sale for payment of debts.⁷

¹ Gray v. Hawkins, 8 O. S. 449.

² Id. See Howard v. Babcock, 7 O. (Pt. 2), 73.

³ Pollock v. Pine, 2 O. C. C. 359.

⁴ R. S., secs. 6139, 6140; Spoor v. Coen, 44 O. S. 497; McCall v. Pixley, 48 O. S. 387; 25 W. L. B. 417; Doney v. Clark, 55 O. S. 294 (unless the rights of a purchaser in good faith have intervened). The power of an administrator over the real estate of his decedent being derived entirely from statute, it necessarily follows

that a fraudulent conveyance can not be impeached by an administrator unless it becomes necessary to sell the same for the payment of debts. Benjamin v. La Barron, 15 O. 518, in which it was intimated that equity would relieve where it was necessary to sell land to pay debts. McCall v. Pixley, *supra*.

⁵ R. S., sec. 6141.

⁶ R. S., sec. 6142.

⁷ Doney v. Dunnick, 8 O. C. C. 163

Sec. 551. Petition to set aside fraudulent conveyance and for sale.—

[Averment of appointment as in ante, sec. 547.]

That valid debts of said decedent amounting to — dollars or more were presented to the said plaintiff as administrator of the estate of said A. B., deceased, which said claims were allowed by him as valid claims against the estate of said decedent. That the total value of the personal estate and effects of the said decedent amounted to the sum of — dollars, which was wholly insufficient to pay the debts and costs of administration.

Plaintiff further represents that the said A. B. died seized as owner, and in possession, of the following described real estate, situate in the county of — and state of Ohio, to wit: *[Description of property.]*

That on the — day of —, 18—, the said A. B., then in full life, conveyed said premises to F. G. by deed purporting to convey the same in fee and to be in consideration of — dollars paid by the said F. G.; but this plaintiff avers that said deed was in fact executed without any consideration and none whatever was paid.

That the said decedent, at the time of executing said deed of conveyance, was largely in debt to divers persons, to wit: *[Name them.]*

That the said A. B., fearing that his said indebtedness was and would be more than he could pay, and that all his property would be insufficient to pay the same, and to hinder and delay his then and any subsequent creditors that he might have, and for the sole purpose of avoiding payment of his said debts, did execute and deliver the said deed to the said A. G., thereby conveying the said premises hereinbefore described; that the said purchaser, F. G., then and afterwards had knowledge and notice of the intention and purpose of the said A. B. in making said conveyance, and that said purchaser received and accepted the same upon agreement and understanding between himself and the said A. B., deceased, that the said F. G. would sell said premises and the title to the same so conveyed to him and their proceeds in trust for the sole use and benefit of the said A. B., deceased, his heirs and assigns, and that he would reconvey the same to him upon request.

The plaintiff further says that the fraud of the said A. B., deceased, in so executing said deed and conveying said premises to the said F. G. as aforesaid, was not discovered by plaintiff or by his creditors aforesaid until after his death and within the four years last past.¹

Plaintiff further says that it is necessary to sell the prem-

¹ See sec. 607, *post*.

ises hereinbefore described to pay the debts of the said A. B., deceased.

Wherefore plaintiff prays that the said conveyance from the said A. B., deceased, to the said F. G., may be declared null and void, and that the same may be sold, the proceeds thereof subjected to the payment of the debts of said decedent and costs of the administration, and that the said proceeds may be brought into court for distribution, and for all other and further proper use and relief in the premises.

NOTE.—From *McCall v. Pixley*, 48 O. S. 387.

Sec. 552. Actions against executor or administrator individually.—Where an action has been brought against surviving executors jointly in their respective capacity on a claim asserted against them in which they have no right of recovery, the plaintiff cannot treat the same as an action brought against them individually, and be allowed to amend the petition for that purpose.¹ Nor has an executor or administrator, in the absence of authority granted by will, the right to take possession of the decedent's leasehold property; and if he does so, and receives the rents and profits therefrom, he becomes personally liable therefor to the lessor, who may elect to hold the estate or the personal representative personally.² But in certain cases it is said that he may be properly charged in his account with the rents which he has collected from the real estate of the decedent.³ An administrator who has knowledge of a valid claim against an estate, and who has funds in his hands with which to pay the same, becomes personally liable therefor if he pays out the funds in his hands without regard to preference.⁴ Where an administrator is sued individually by creditors, and appears and answer to the action in his individual capacity, he cannot after verdict ask for a new trial in order that he may be allowed to make a defense in his representative capacity.⁵ An executor may, by virtue of power of sale under a will, make a contract with a purchaser for a sale of land at less than purchase price fixed by the testator, and may be held personally responsible to an injured party in damages;⁶

¹ *Fleischman v. Shoemaker*, 2 O. C. C. 152.

² *Becker v. Wallworth*, 45 O. S. 169.

³ *Campbell v. McCormick*, 1 O. C. C. 504.

⁴ *In re Wakefield, Goebel*, 5.

⁵ *Ten Eick v. Dye*, 14 W. L. B. 214.

⁶ *Pollock v. Pine*, 2 O. C. C. 359.

and actions upon an oral contract to convey land, for the recovery of compensation in lieu of specific performance, should be brought against the real and not the personal representative.¹ A suit cannot be maintained against an executor individually upon a contract made upon a consideration that the executor would resign, as such a contract is void.² An action cannot be maintained against an administrator or executor for the recovery of attorney fees if based upon a contract. Such expenses are usually allowed, upon the principle that an executor may use the funds of an estate for purposes authorized by law; but an executor or administrator has no power to make such a contract upon a new consideration, unless authorized by law so to do, and cannot bind the estate for payment of fees so incurred. A contract so made is regarded as personal to the executor or administrator.³

Sec. 553. Actions on rejected claims.—If a claim is presented to an administrator before the estate is declared insolvent, and is rejected by him, the claimant must bring suit thereon within six months from such rejection if the debt be then due, or within six months after some part thereof shall have become due.⁴ And if the claim has been rejected by an administrator or executor upon the written request of an heir or creditor by the proper proceedings, the owner of such claim must bring suit thereon against the administrator or executor within six months after such rejection.⁵ Verbal notice by the widow to the administrator not to allow a claim is not sufficient.⁶ An administrator may require claims to be verified.⁷ A formal presentation is waived where an administrator has seen and examined a claim and refused to allow it.⁸ Where a bond has been given by an heir or creditor in accordance with the provision of the statute,⁹ the persons

¹Crabill v. Marsh, 88 O. S. 331; Bullard, 5 Gray, 404; Taylor v. My-Howard v. Brower, 37 O. S. 403. gat, 26 Conn. 184.

²Withers v. Ewing, 40 O. S. 400.

⁴R. S., sec. 6097.

³McBride v. Brucker, 5 O. C. C. 12;

⁵R. S., sec. 6098.

Austin v. Munro, 47 N. Y. 364; Lucht v. Behrens, 28 O. S. 231; Kittredge v.

⁶Thomas v. Chamberlain, 39 O. S. 112.

Miller, 19 W. L. B. 119; Lovell v.

⁷R. S., sec. 6092.

Field, 5 Vt. 221; Fitzhugh v. Fitz-

⁸Kyle v. Kyle, 15 O. S. 15.

hugh, 11 Gratt. 300; Luscomb v.

⁹R. S., sec. 6098.

giving the same should be made parties to an action on the rejected claim, that they may be allowed to set up any defense they may have thereto.¹ In suits against an administrator or executor upon a rejected claim the petition must show a compliance with the various provisions of the statutes. All technical objections as to informality in an affidavit accompanying a claim are waived, however, by the indorsement of the disallowance thereon.² It is essential to prove presentation and rejection of a claim, or to show some other reason why the administrator is liable to be sued thereon,³ though a formal rejection is not a prerequisite to the right to maintain such suit.⁴ It will be considered rejected if the executor informs the creditor to so consider it, even though no formal indorsement of the disallowance is made thereon, and in such case suit must be brought within six months.⁵ In an action on a rejected claim it is not necessary to aver and prove that at the time the claim was rejected a specific demand for the indorsement of the disallowance thereon was made;⁶ and a holder of a claim having presented the same to the administrator, and given ample time to examine and allow it, may bring an action thereon even though no disallowance has been indorsed thereon and no demand has been made for such disallowance.⁷ If suit be brought within six months after its rejection, and a judgment thereon is reversed after the expiration of the six months, the plaintiff is nonsuited.⁸ No suit can be maintained against an administrator or executor until after the expiration of eighteen months from the date of his bond unless it be a claim which would not be affected by the insolvency of the estate, or unless it be brought after the estate has been represented insolvent, or unless the same has been exhibited to the executor or administrator and been rejected by him.⁹

¹ Fullerton v. Davis, 1 O. C. C. 572. Treasurer v. Walker, 22 W. L. B.

² Morgan v. Bartlette, 8 O. C. C. 106.

481.

³ Yager v. Greiss, 1 O. C. C. 581.

⁴ Treasurer v. Walker, 22 W. L. B.

106.

⁵ Harter v. Taggart, 14 O. S. 122.

⁶ Stambaugh v. Smith, 28 O. S. 584;

⁷ Treasurer v. Walker, 22 W. L. B. 106; Kyle v. Kyle, 15 O. S. 15.

⁸ Haymaker v. Haymaker, 4 O. S. 272.

⁹ R. S., sec. 6108.

Sec. 554. Petition against executor or administrator on rejected claim.—

[*Caption and averment of appointment as in ante, secs. 546-7.*]

There is due plaintiff from the defendant as executor [*or, administrator*] the sum of — dollars upon an account of which the following is a copy with all the credits and indorsements thereon [*or attached, as in ante, secs. 57-8, 152.*]

Plaintiff further states that he presented to the defendant, D. H. M., as executor of the estate of E. D., deceased, a written statement of his said claim, and demanded the indorsement of allowance thereon, but that said defendant on the — day of —, 18—, refused and rejected said claim, and refused to indorse his said allowance thereon.

Plaintiff further asks that he may recover judgment against the said defendant for the said sum of — dollars with interest from —.

Sec. 555. Petition on unpaid claim allowed.—

[*Caption. Averment of appointment as in ante, secs. 546-7. State cause of action, as in ante, sec. 554.*]

Plaintiff further says that he presented to the defendant A. B., as executor of the estate of E. D., deceased, a copy of his said claim, duly authenticated according to law, which said claim was allowed by the said defendant as shown by his indorsement thereon as follows: [*Copy of indorsement of allowance.*]

That more than eighteen months have expired from the date of the bond of the said defendant as administrator, but that said defendant has wholly failed, refused and neglected to pay said plaintiff's claim or any part thereof.

Plaintiff therefore prays judgment against said defendant for the sum of — dollars with interest from —.

Sec. 556. Defenses to actions on claims.—An administrator or executor to avail himself of the defense to an action upon a rejected claim, that it was not presented within the prescribed time, must plead that fact, setting forth all facts showing due notice and publication of his appointment.¹ Where a claim has been presented twice upon the theory that the first presentment was not properly made, the limitation for bringing suit begins to run from the date of the first presentment.² The limitation of six months in which rejected claims must be sued is penal in its nature and must, therefore, be strictly construed. A party seeking to avail himself of this provision as a defense must bring himself strictly within

¹ Ryan v. Flanagan, 38 N. J. L. 161.

² Gillespie v. Wright, 93 Cal. 169.

its terms.¹ If a claim is past due when rejected, it will become barred unless suit is brought thereon within six months.² Where an administrator joins issue and goes to trial on a claim, he cannot be heard afterwards to object that the same was not presented for allowance before the action was brought, as such objection would be waived.³ A judgment cannot be rendered upon a claim disallowed more than six months before the action thereon is commenced, and a failure on the part of an executor to plead the statute limiting the time does not give the court a right to render judgment thereon.⁴ If suit is brought by a creditor upon a claim which has been allowed, and the estate is solvent, the provision limiting actions against the administrator until after the expiration of the eighteen months⁵ has no application, as such creditor is entitled to payment within the eighteen months.⁶ A petition on a claim falling within the eighteen months' limitation which fails to allege that the eighteen months have elapsed is bad upon demurrer.⁷ Nor can a suit be brought against a decedent's estate within eighteen months after letters of administration have been issued, unless the claim has been first presented.⁸ Where an executor is relieved from giving bond, a suit on a claim against the estate can only be brought within four years from the date of the appointment if the proper notice of such appointment has been given.⁹ An action may be maintained on a rejected claim after the expiration of eighteen months from the date of the bond and such further time as may be granted by the court for the collection of the assets.¹⁰

Sec. 557. Actions to set aside erroneous or fraudulent settlements.—The heirs or distributees may maintain an action against an administrator or executor to set aside a

¹ *Keenan v. Saxton*, 8 O. 41; *Harter v. Taggart*, 14 O. S. 122; *Kyle v. Kyle*, 15 O. S. 15; *Stambaugh v. Smith*, 28 O. S. 584; *Thomas v. Chamberlain*, 39 O. S. 116; *Reynolds v. Collins*, 3 Hill, 36.

² *McKent v. Kent*, 2 W. L. M. 540.

³ *Pepper v. Ridwell*, 36 O. S. 454.

⁴ *Pollock v. Pollock*, 2 O. C. C. 140; *Brown v. Anderson*, 18 Mass. 203.

⁵ R. S., sec. 6108

⁶ *Greer v. State*, 2 O. S. 574; *Levi v. Buchanan*, 2 C. S. C. R. 144;

Rhodes v. Doggett, 3 W. L. M. 184.

⁷ *Rhodes v. Doggett*, 3 W. L. M. 184;

Levi v. Buchanan, 2 C. S. C. R. 144;

Hammerle v. Kramer, 12 O. S. 252.

⁸ *Keenan v. Saxton*, 18 O. 41.

⁹ *Delaplane v. Smith*, 38 O. S. 412.

¹⁰ *Thomas v. Chamberlain*, 39 O. S. 112.

fraudulent settlement made by him with the probate court, and to compel an accounting to be made by such administrator.' There being no liability upon the part of the sureties of an administrator to account to the heirs, this action cannot therefore be sustained against the administrator and his sureties jointly.³

In framing a petition to set aside a fraudulent settlement, after alleging the representative capacity of the defendant, it may be stated that:

Plaintiff states that he is an heir-at-law of the said C. D., deceased, and as such heir entitled to a distributive share of the estate of the said C. D., deceased. That the defendant, as administrator of the estate of the said C. D., deceased, did on the — day of —, 18—, file in the probate court of — county, Ohio, his final account, which said account was on the — day of —, 18—, duly examined and allowed by said court, and a balance of \$— found in the hands of said defendant, as said administrator, which he was ordered to pay over and distribute according to law.

Plaintiff states that said defendant erroneously [*or, fraudulently*] credited himself in his said account with the following items as having been paid out by him, which, in fact, were not so paid by him [*name items and any other matters*].

Plaintiff therefore prays that said account may be set aside and held for naught, and that the court will take an account of the transactions of said defendant as such administrator, and that he be ordered to pay any balance remaining in his hands as such administrator into court for further orders.

Sec. 558. Action for recovery of distributive share.— A legatee, widow or distributee, after an order of distribution has been made, may prosecute an action upon the bond of an executor or administrator for the recovery of their share of the estate.⁴ Such an action may be based either upon the bond or regarded as a mere personal liability secured thereby. In the latter case it will be barred within six years after the expiration of thirty days from the date of the order of distribution;⁵ and legatees may maintain this suit without first having the probate court fix the amount of the legacy or order its payment.⁶ This action may be maintained by a distributee who has not received his proportionate share, not-

¹ Reed v. Reed, 25 O. S. 423.

⁴ Lease v. Downey, 5 O. C. C. 480.

² Cadwallader v. Longley, 1 Disn. As shown in a preceding section, 497. See ch. 23, Bonds, sec. 354. *ante*, sec. 559, and note to form.

³ R. S., sec. 6211. See ch. 23, sec. 354.

⁵ Mighton v. Dawson, 88 O. S. 670.

withstanding the fact that the remainder of the distributees have received their share.¹ Distributees of the personal estate cannot join in an action against an administrator for the recovery of their distributive share.² And an administrator or executor cannot retain out of the share of a distributee any portion of his share in payment of a debt due by him to the estate which was barred during the life-time of the decedent.³ Before the adoption of the code suits for the recovery of a legacy or distributive shares of an estate were concurrently within the jurisdiction of courts at law and chancery and not subject to the statute of limitations, but it is otherwise under the code.⁴

Sec. 559. Petition for recovery of distributive share.—

[Averment of representative capacity as in ante, sec. 547.]

After the defendant entered into the discharge of his duties as such administrator there came into his hands a large amount of assets belonging to said estate to be by him administered according to law, and on the — day of —, 18—, said defendant filed in the probate court of — county his final account as such administrator. Thereafter, on the — day of —, 18—, by the consideration of said probate court, said account was duly examined, allowed and settled, and said court found that there remained in the hands of said defendant as such administrator for distribution a balance of — dollars, which said balance said administrator was, on said — day of —, 18—, by the consideration of said court, adjudged to pay over and distribute according to law.

The plaintiff is one of the heirs at law [*or, widow*] of the said J. B., deceased, and as such heir entitled to receive out of said balance, so as aforesaid adjudged to be distributed according to law, the sum of — dollars.

Plaintiff has demanded of said defendant as such administrator payment of the said sum of — dollars, his distributive share of said estate, but defendant has wholly failed, refused and neglected to pay the same.

Plaintiff therefore prays judgment against the said defendant for the sum of — dollars, with interest thereon from the said — day of —, 18—, being the day when said money became due to plaintiff, and to such further relief as he may be entitled.

NOTE.— R. S., secs. 6195-6199; *Lease v. Downey*, 5 O. C. C. 480.

¹ *Negley v. Guard*, 20 O. 810.

Garrett v. Pierson, 29 Ia. 304. The

² *Waldsmith v. Waldsmith*, 2 O. 156.

³ *Harrod v. Carder*, 8 O. C. C. 479.

The contrary doctrine is held in England. *Williams on Executors*, sec.

following cases sustain the text: 2 *Pearson*, 478; *Drysdale Case*, 14 Pa. St. 581; *Reed v. Marshall*, 90 Pa. St. 355.

⁴ *Webster v. Bible Society*, 29 W. 1304; *In re Boggart*, 38 Hun. 466; L. B. 141.

CHAPTER 36.

FALSE IMPRISONMENT.

Sec. 560. Nature of the action — Pleading.	Sec. 565. Averment of damages.
561. Action against an individual making complaint.	566. Petition for damages for false imprisonment.
562. Action against magistrate and judicial officers.	567. Defenses to actions for false imprisonment.
563. Action against other officer.	568. Answer of justification under process.
564. Actions against carrier of passengers.	569. Answer by individual.

Sec. 560. Nature of the action — Pleading.—The action for false imprisonment is the common-law action for trespass, and consists in the unlawful restraint of a person without his consent, either with or without process. In Ohio it must be brought within one year from the time it occurs.¹ It is distinguished from malicious prosecution in that in the latter there must be malice and want of probable cause for an arrest and imprisonment, while in the former the process or order by which the real imprisonment is effected must be absolutely void.² Although malice is not an essential ingredient of the action, yet it may be taken into consideration upon the question of damages.³ Where the allegation of a petition makes it an action for malicious prosecution, an amendment may be permitted by striking out the words "want of probable cause," and averring that the arrest was illegally made, and with force, thus changing it into an action for false imprisonment.⁴ To constitute false imprisonment it is not es-

¹ O. Code, sec. 4983.

Ill. 315; Woodall v. McMillan, 36

² Spice v. Steinruck, 14 O. S. 213;

Ala. 623.

Seeger v. Pfeiffer, 85 Ind. 18; Boaz v. Tate, 48 Ind. 60; Colter v. Lower, 85 Ind. 285; Carey v. Sheets, 60 Ind. 17; Diehl v. Friester, 87 O. S. 473. The words "without reasonable or probable cause" may be rejected as surplusage. Johnson v. Von Kettler, 84

³ Johnson v. Bouton, 85 Neb. 898; Comer v. Knowles, 17 Kan. 436; Hewitt v. Newberger, 20 N. Y. S. 913; s. c., 66 Hun, 230; Cunningham v. Electric Light Co., 17 N. Y. S. 372, and cases cited.

⁴ Spice v. Steinruck, *supra*; John-

sential to aver and prove that the defendant used any violence in causing the imprisonment.¹ In stating the cause of action the ordinary rules of pleading should be observed, and hence it is not necessary to set forth all the facts and circumstances, but the same should be stated in plain and concise language, and not at great length.² The particular instrumentality by which the plaintiff was deprived of his liberty should be stated;³ and if the petition does not show that the arrest was unlawfully made, it is demurrable.⁴

Sec. 561. Action against an individual making complaint.

Upon the question as to the liability of a person making a complaint or affidavit before a magistrate or other court, there seems to be some conflict between the different courts in New York. The higher and lower courts are not in harmony upon this question. In Ohio, however, the rule is laid down in unequivocal terms, that where a court issues a warrant of arrest without authority in law, that is, without jurisdiction, both the court and complainant are responsible in an action for false imprisonment at the suit of an injured party.⁵ Other jurisdictions have adopted the same rule, and hold all who participate in the unlawful detention liable;⁶ while still other courts hold that the one who makes the complaint is not responsible for a wrongful arrest, placing the responsibility entirely upon the officer whose duty it is to determine whether or not a warrant should issue.⁷ The courts adopting the latter view, however, hold that the complainant to become responsible must be guilty of some improper conduct in connection with the arrest and imprisonment, and that he is relieved if he has reasonable cause to believe that the crime

son v. Corrington, 8 W. L. B. 1189.

Although this would seem unnecessary according to some authority.

Johnson v. Von Kettler, 84 Ill. 315;

Woodall v. McMillan, 88 Ala. 622.

¹ Hawk v. Ridgeway, 88 Ill. 478.

² Eddy v. Beach, 7 Abb. Pr. 17;

Shaw v. Jayne, 4 How. Pr. 119.

³ Eddy v. Beach, *supra*.

⁴ Cunningham v. East River Elec. Light Co., 17 N. Y. S. 372; Marks v. Townsend, 97 N. Y. 596; Castro v. Uriarte, 12 Fed. Rep. 250.

⁵ Truesdell v. Combs, 83 O. S. 186;

Wheeler v. Gavin, 5 O. C. C. 246.

⁶ Johnson v. Bouton, 85 Neb. 896;

Comer v. Knowles, 17 Kan. 436; 7

Am. & Eng. Enc. of Law, 679;

Vaughn v. Congdon, 56 Vt. 111;

Miller v. Adams, 52 N. Y. 409; Guil-

leau v. Rowe, 94 N. Y. 269.

⁷ Latham v. Libby, 38 Barb. 339;

Hewitt v. Newberger, 20 N. Y. S. 918;

s. c., 66 Hun, 230; Teal v. Fissel, 28

Fed. Rep. 351; Langford v. Railroad

Co., 144 Mass. 481.

has been committed, and merely furnishes the information.¹ Where one not only swears to the affidavit for an arrest but directs the officer to arrest one who turns out to be the wrong person, the act of the officer in such case is the act of the complainant, and the latter is liable.* Where the affidavit is made under a municipal ordinance which is afterwards declared invalid, such person is not liable to an action for false imprisonment.² In setting forth a cause of action for false imprisonment against one who makes the complaint, the petition should state facts showing that the imprisonment was without jurisdiction and without legal process.³ It should also be averred that the order of arrest has been vacated.⁴ If imprisonment is made upon a lawful warrant at the instigation of a person for the purpose of enforcing a debt, the remedy is for malicious prosecution.⁵

Sec. 562. Actions against magistrates and judicial officers.—It is well settled that inferior tribunals clothed with special or limited jurisdiction must at their peril keep within the bounds of their prescribed jurisdiction, and are answerable to any one injured by any acts in excess thereof.⁶ A justice of the peace cannot be held liable where he believes a defendant is guilty of an offense charged when acting within his jurisdiction.⁷ The duties of a magistrate in issuing an order of arrest in civil actions are regarded as of a ministerial character, and an action for an injury in this respect should be upon his bond.⁸ So long as a judicial officer or magistrate keeps himself within the limits of the jurisdiction conferred upon him, he cannot be held liable for a wrongful imprisonment under a mistaken idea of the law;⁹ nor is he liable if he believes the accused probably guilty of the offense charged;¹⁰ nor is a magistrate liable if he commits a person under an

¹ *Teal v. Fissel*, *supra*; *Murphy v. Clark v. May*, 2 Gray, 410; *Knowles v. Davis*, 2 Allen, 61; *Piper v. Pearson*, 2 Gray, 120; *Courcey v. Cox*, 94 Cal. 665. *Cf. Lang v. Benedict*, 73 N. Y. 12.

² *Wheeler v. Gavin*, 5 O. C. C. 246; *Gifford v. Wiggin*, 52 N. Y. 904.

³ *King v. Johnston*, 81 Wis. 578;

Murphy v. Martin, 58 Wis. 276; *Getzenleuchter v. Neumeyer*, 64 Wis. 321; *Cunningham v. Electric Light Co.*, 17 N. Y. S. 372; *Nemitz v. Conrad*, 22 Ore. 106; 29 Pac. Rep. 548 (1892); *Painter v. Ives*, 4 Neb. 122.

⁴ *Searll v. McCracken*, 16 How. Pr. 262.

⁵ *Mullen v. Brown*, 188 Mass. 114; *Coupal v. Ward*, 106 Mass. 289; *Colter v. Lower*, 35 Ind. 285.

⁶ *Truesdell v. Combs*, 33 O. S. 194;

⁷ *Marks v. Sullivan*, 8 Utah, 406; 33 Pac. Rep. 224 (1893).

⁸ *Place v. Taylor*, 22 O. S. 317.

⁹ *Budd v. Darling*, 25 Atl. Rep. 479; s. c., 64 Vt. 456; *Austin v. Vrooman*, 38 N. Y. 229; *Booth v. Karrus*, 26 Atl. Rep. 1018 (N. J., 1893); *Henderson v. Brown*, 1 Caines, 92.

¹⁰ *Booth v. Karrus*, 26 Atl. Rep. 1018 (N. J., 1893); *Marks v. Sullivan*, 8 Utah, 406; 33 Pac. Rep. 224.

* *Drinkwater v. Jones*, 13 O. C. C. 489; 7 Oh. Dec. 173.

ordinance which is invalid.¹ An action may be joined against both the judge who issued the warrant and the officer making the arrest.²

Sec. 563. Actions against other officers.— There is no liability on the part of an officer making an arrest under a warrant issued by a court which has jurisdiction of the offense charged, as he is protected under such a writ.³ An action for false imprisonment will not lie where the arrest was made under a lawful process wrongfully obtained.⁴ A constable who acts under the orders of a justice of the peace, who receives a witness in a criminal case in obedience to an order of commitment and detains him for one day during the continuance of the case, is not liable for an action for false imprisonment;⁵ nor is an officer of the legislative department liable for an arrest made under the direction of the legislature;⁶ but an officer who arrests a man and, instead of taking him before a magistrate to be dealt with according to law, compels him to pay a fine or go to jail, is liable for false imprisonment.⁷ A police officer is not authorized by law to arrest, without a warrant, any one on suspicion of being a deserter from the United States army. Hence an action for false imprisonment will lie against an officer making such an arrest.⁸

Sec. 564. Actions against carriers of passengers — Liability of carriers.— A carrier of passengers is liable for any misconduct of its servants in wrongfully ejecting a passenger and causing his arrest.⁹ The company cannot be held liable if the arrest be made by the police authorities.¹⁰

¹ *Wheeler v. Gavin*, 5 O. C. C. 246;

Brooks v. Mangan, 86 Mich. 576.

See, also, *Gifford v. Wiggins*, 53 N.

W. Rep. 904 (Minn., 1892); *Kelly v.*

Beemish, 4 Gray, 88.

² *Zeller v. Martin*, 84 Wis. 4; 54 N.

W. Rep. 330 (1893).

³ *Jennings v. Thompson*, 55 N. J.

L. 55; *Cooley on Torts*, 400; *Seava-*

cool v. Boughton, 21 Am. Dec. 190;

Lieb v. Iron Co., 12 So. Rep. 67 (Ala.,

1893); *Hobbs v. Ray*, 25 Atl. Rep.

694 (R. I., 1892); *Johnson v. Morton*,

53 N. W. Rep. 816; s. c., 94 Mich. 1;

Marks v. Sullivan, 8 Utah, 406; s. c.,

33 Pac. Rep. 224 (1893).

⁴ *Hobbs v. Ray*, 25 Atl. Rep. 694

(R. I., 1892).

⁵ *Fawcett v. Linthecum*, 7 O. C. C.

141.

⁶ *Canfield v. Gresham*, 17 S. W.

Rep. 10; 82 Tex. 10.

⁷ *Twilley v. Perkins*, 26 Atl. Rep.

286 (Md., 1893).

⁸ *Kendall v. Scheve*, 3 O. C. C. 526.

⁹ *Shea v. Manhattan Ry. Co.*, 15 Daly,

528; *Oppenheimer v. Manhattan Ry.*

Co., 18 N. Y. S. 411; *Southern Pac.*

Co. v. Hamilton, 54 Fed. Rep. 468;

Norfolk, etc. R. R. Co. v. Galliher, 16

S. E. Rep. 935 (Va., 1893).

¹⁰ *Oppenheimer v. Manhattan Ry.*

Sec. 565. Averment of damages.— If the plaintiff desires to make any claim for damages for injury to character, the facts with reference thereto must be specially pleaded;¹ but the recovery will not be limited to nominal damages merely because there is no allegation of special damages.² Evidence as to special damages arising by reason of the kind of food furnished during imprisonment cannot be admitted in the absence of an averment to that effect.³

Sec. 566. Petition for damages for false imprisonment.—

Plaintiff states that the defendant D. E. is, and was at the time of the grievances hereinafter complained of, a police officer of the city of C. That on the — day of —, 18—, said defendant arrested and imprisoned this plaintiff, and unlawfully and by force deprived him of his liberty for one day on a pretended charge of desertion from the United States army.

That by reason of such unlawful and wrongful imprisonment, plaintiff was thereby prevented from attending to his business during the time he was so under arrest, and incurred an expense of \$— in obtaining his discharge and suffered damages in sum of \$—, for which sum he prays judgment.

NOTE.— Adapted from *Kendall v. Donahue*, 3 O. C. C. 526.

Sec. 567. Defenses to actions for false imprisonment.—

The fact that an arrest was justifiable is purely a matter of defense, and must be specifically set forth, as it cannot be shown under a general denial.⁴ A defense that an offense had been committed and that the officer had reasonable grounds to believe that the plaintiff was guilty should be specially pleaded and cannot be made under a general denial.⁵ An answer which attempts to justify an arrest and imprisonment must identify the trespass complained of;⁶ but an answer of justification sufficiently identifies the imprisonment if it states that it is the same imprisonment complained of by the plaintiff.⁷ A defense that the defendant assisted the officer who made the arrest, under compulsion, is good where there has been

Co., *supra*; *Gillingham v. Railroad Co.*, 35 W. Va. 588. But see *Cunningham v. Railway Co.*, 3 Wash. 471; 28 Pac. Rep. 745; *Palmeri v. Manhattan Ry.*, 133 N. Y. 261.

¹ *Comer v. Knowles*, 17 Kan. 436.

² *Josselyn v. McAllister*, 22 Mich. 300.

³ *Miles v. Weston*, 60 Ill. 361.

⁴ *Carey v. Sheets*, 60 Ind. 17; *Boaz v. Tate*, 43 Ind. 61; *Willson v. Manhattan Ry. Co.*, 20 N. Y. S. 852.

⁵ *White v. McQueen*, 96 Mich. 249; 55 N. W. Rep. 848 (1893).

⁶ *Gallimore v. Ammerman*, 39 Ind. 323.

⁷ *Scircle v. Neeves*, 47 Ind. 239.

filed a proper affidavit and legal process issued.¹ And so a defense that a marshal or constable arrested the plaintiff on the street while intoxicated, and that he had just assaulted a citizen, and that he was arrested and detained until he became sober, is good where a criminal charge is properly filed against him.² An answer that an arrest was made under a warrant must clearly show that the arrest was made for the offense charged in the complaint.³ It is a good defense by an individual that at the time he made the affidavit for arrest he acted upon the advice of the justice.⁴ It has been held that an action will not lie against a person who makes a complaint before a magistrate or arresting officer where the warrant issued thereon is sufficiently regular on its face to protect the officer who executes it.⁵

Sec. 568. Answer of justification under process.—

Defendant was a constable of — township, — county, Ohio, duly elected, qualified and acting as such. On the — day of —, 18—, by virtue of a warrant of arrest duly issued by a duly qualified and acting justice of the peace of said township, he arrested and brought before said justice one P. G., charged with the crime of burglary and larceny, the said charge then and there pending before the justice upon the complaint of one O. The accused, on being arraigned, pleaded not guilty; and in the opinion of the magistrate it was necessary to adjourn the examination of the accused on the pending charge to the next day, which was done. The accused was thereupon ordered to enter into a recognizance for his appearance for an examination, which he failed to do, and was by the magistrate committed to his custody; that at the same time the plaintiff was present at said trial under subpoena as a witness against the accused, and was required by said justice to enter into recognizance, with sufficient sureties, to give evidence against the accused on the — day of —, 18—, which the said plaintiff failed and refused to do; that thereupon the said magistrate, by an order and warrant in writing, duly committed said plaintiff into the custody of this defendant for safe keeping until he complied with the order of said magistrate or was otherwise discharged. That in pursuance of said order of commitment this defendant received the said plaintiff into his custody and detained him until he

¹ Goodwine v. Stephens, 68 Ind. 112. Stanton v. Hart, 27 Mich. 539; Straus

² Wilke v. Holt, 95 Ind. 469. v. Young, 86 Md. 247.

³ Young v. Warder, 94 Ind. 357. ⁴ Wheaton v. Beecher, 49 Mich. 348;

⁵ Dolbe v. Norton, 23 Kan. 101. Newman v. Davis, 58 Ia. 447.

See White v. Tucker, 16 O. S. 468;

was discharged, and had him before the magistrate on the — day of —, 18—, to give evidence against the accused; that this defendant did not otherwise or to any further extent detain or imprison the plaintiff, and therefore asks that he may go hence, with his costs.

Sec. 569. Answer by individual.—

That on the — day of —, 18—, the horse of one C. D., of the value of \$—, had been stolen and feloniously taken away from — county, state of Ohio. [*State the causes of suspicion against the plaintiff.*]

That the defendant, having good and probable cause to suspect that the plaintiff committed said felony, arrested him and took him before E. F., a justice of the peace of said — county, to be examined and dealt with according to law, and the acts above set forth are the same of which the plaintiff complains in his said petition.

CHAPTER 37.

FORECLOSURE OF MORTGAGES — REAL AND CHATTEL — REDEMPTION AND DECLARING DEED A MORTGAGE

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| <p>Sec. 570. Parties plaintiff to actions in foreclosure.</p> <p>571. Parties defendant.</p> <p>572. Limitations to actions to foreclose mortgages.</p> <p>573. Nature of the action — Personal judgment, etc.</p> <p>574. Averments as to liens.</p> <p>575. Allegation of demand.</p> <p>576. Stipulations as to defaults in payment of instalments and interest.</p> <p>577. Litigating paramount titles.</p> <p>578. Petition in foreclosure by the original mortgagee — Simple form.</p> <p>579. Petition where another party claims to own a portion of the premises, and against other mortgagees.</p> <p>580. Petition by executor of mortgagee against widow and heirs of mortgagor for foreclosure merely.</p> <p>581. Petition where mortgage was taken upon fraudulent representations that there were no other mortgages.</p> <p>582. Petition against defendants holding tax-title deed claimed to be void, and defendant holding premises under land contract.</p> <p>583. Petition by assignee of notes and mortgage against maker and indorser, for personal judgment and foreclosure.</p> | <p>Sec. 584. Petition by mortgagee against purchaser assuming mortgage — Prayer for personal judgment.</p> <p>585. Service.</p> <p>586. The right to trial by jury.</p> <p>587. Sale of mortgaged property.</p> <p>588. Motion to set aside, in part, decree of confirmation.</p> <p>589. Defenses in foreclosure proceedings.</p> <p>590. Answer that defendant holds premises under land contract, and that mortgage was given after execution of contract.</p> <p>591. Answer asking to have mortgaged premises sold in inverse order of alienation.</p> <p>592. Answer that note bears usurious interest and that payments made thereunder reduce amount due.</p> <p>593. Answer that notes were without consideration and were purchased after maturity.</p> <p>594. Answer and cross-petition setting up judgment lien.</p> <p>595. Answer that note and mortgage was made to cheat and defraud creditors, and without consideration.</p> <p>596. Answer by defendant after proceeds are in court, contesting co-defendant's mortgage.</p> |
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Sec. 597. Answer and cross-petition of building association in foreclosure proceedings.

FORECLOSURE OF CHATTEL MORTGAGE.

598. Actions to foreclose chattel mortgages.

599. Petition to foreclose chattel mortgage.

DEED DECLARED A MORTGAGE.

Sec. 600. Action to declare deed a mortgage.

601. Petition to declare deed a mortgage when there is a verbal agreement to reconvey.

602. Reformation of mortgages.

603. Action to redeem mortgage.

Sec. 570. Parties plaintiff to actions in foreclosure.—

One of the most difficult and important steps to be taken in the foreclosure of a mortgage or other lien is to see that all proper parties are brought before the court. Close examination of records is required. The measure of responsibility is equally as great upon the person who counsels the purchaser. As adjudications upon the subject of parties in foreclosure proceedings are numerous, it therefore seems unnecessary to attempt in a work of this nature to make a complete review. As the proceeding is an adversary one, it is essential that jurisdiction be acquired over the person and the *res*.¹ It is settled that the only proper parties, as far as mere legal rights are concerned, are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage.² It is the duty of the court upon discovering that all proper parties are not before it, to order them to be made parties,³ as it is the well-settled rule of practice that claims may be brought in at any time up to the distribution of the proceeds, such claims being entitled to share therein.⁴

Following the equitable rule now embodied in the code, that an action should be brought in the name of the real party in interest, one who merely holds an equitable interest in the property, such as mortgagee or pledgee, may maintain an action for foreclosure.⁵ All persons interested in the mort-

¹ Moore v. Starks, 1 O. S. 369.

² Frost v. Koon, 30 N. Y. 428; Eagle F. Co. v. Lent, 6 Paige, 635; Emigrant, etc. Bank v. Goldman, 75 N. Y. 127, 131.

³ Thacker v. Dickinson, 3 O. C. C. 144. See *ante*, sec. 16.

⁴ Allemania v. Mueller, 7 W. L. B. 301 (Ham. Co. C. P., 1892). Such an

answer cannot be stricken from the files (Allemania v. Mueller, *supra*), nor should the court dismiss a necessary party asserting a lien without prejudice. Thacker v. Dickinson, *supra*.

⁵ See *ante*, sec. 8. See also cases cited in note 1, on p. 513.

gaged premises should be made parties in order to bar the right of redemption, even though the sale is made upon the oldest lien. Where lienholders are so numerous that it becomes impracticable to bring them all before the court as parties, some may be allowed to prosecute for the benefit of all.¹ An administrator may maintain an action to foreclose a mortgage made payable to his decedent;² and so may a mortgagee, who has been appointed administrator of his mortgagor's estate, maintain an action to foreclose his own mortgage against the heirs.³ A person who acquires notes and mortgages by virtue of proceedings in attachment may maintain the action, as ownership is in legal effect assigned to him.⁴ An assignee of one of several notes secured by mortgage may bring an action in his own name,⁵ as the transfer carries such a proportional interest in the security as the notes transferred bear to the whole.* Where one of several notes secured by mortgage has been assigned, each person who holds a separate note must bring a separate action thereon for foreclosure, as they can not join in one suit;⁶ and if the assignment be absolute and the entire interest transferred, the mortgagee need not be made a party, although it may be the better practice to do so.⁷ All holders of notes must be made parties, so that the amounts and priorities may be determined.⁸ A junior mortgagee may maintain an action to foreclose against those having an interest in the premises to subject the same to the payment of all liens thereon, without having first paid off the prior mortgage.⁹ An owner of a mortgage who has pledged the same as collateral, may nevertheless bring an action in foreclosure, but should make his pledgee a party.¹⁰ It is equally well settled that a pledgee may maintain an action to foreclose in his own name, but is limited to the recovery only of the amount of his

¹ *Carpenter v. Canal Co.*, 35 O. S. 307.

² *Miller v. Donaldson*, 17 O. 264.

³ *Hunsucker v. Smith*, 49 Ind. 114.

⁴ *Alsdorf v. Reed*, 45 O. S. 658; *Secor v. Witter*, 39 O. S. 218; *Edwards v. Edwards*, 24 O. S. 411.

⁵ *Swartz v. Leist*, 18 O. S. 419; *Gower v. Howe*, 20 Ind. 396; *Myers v. Wright*, 33 Ill. 284.

⁶ *Sivenson v. Plow Co.*, 14 Kan. 387; *Pettibone v. Edwards*, 15 Wis. 104.

* *Kernohan v. Manss*, 53 O. S. 133, and cases cited.

⁷ *McGuffey v. Finley*, 20 O. 474; *Newman v. Chapman*, 2 Rand. 92.

⁸ *Winters v. Bank*, 33 O. S. 250; *Bushfield v. Meyer*, 10 O. S. 334; *Bank v. Covert*, 13 O. 240. This rule is based upon the theory that the assignment operates as an assignment *pro tanto* of the mortgage.

⁹ *Stewart v. Johnson*, 30 O. S. 24.

¹⁰ *Simson v. Satterlee*, 64 N. Y. 657;

McKinney v. Miller, 19 Mich. 142; *George v. Woodward*, 40 Vt. 672;

Brunnette v. Schetter, 21 Wis. 189.

own claim.¹ A mortgagee who is a trustee for the holders of notes secured by mortgages is a proper party plaintiff, although he does not own anything in his own right.² He falls within the meaning of the code³ as a person with whom or in whose name a contract is made for the benefit of another, and is expressly authorized to bring the action. He is more than a mere mortgagee holding naked legal title to the mortgaged property. He is presumptively clothed with requisite power to act for the holders of the note in an action to collect the debt. Whether or not the beneficiaries are numerous, he may nevertheless sue without uniting those for whose benefit the action is prosecuted.⁴

Sec. 571. Parties defendant.— All persons who have claims against or are interested in the mortgaged premises should be made parties to bar the liens or right of redemption. Foreclosure proceedings being adversary, it is essential that jurisdiction over both person and thing be acquired. The mortgagor and all minor defendants must be personally served. The appointment of a guardian *ad litem* for minor defendants who have not been served with process does not give jurisdiction over them.⁵ A widow is entitled to dower, even though she signs a mortgage, where her husband's assignee has sold the mortgaged premises and also other property, the proceeds of which pay the mortgage debts and cancel the mortgage during the life-time of the husband. A sale under such circumstances does not bar her right of dower.⁶ So a widow who united with her husband in a mortgage upon lands seized by him during coverture should be made a party so as to bar her right of redemption; and foreclosure before her husband's death without making her a party to the proceedings will not divest her of that right.⁷ The dower of a wife is not affected in foreclosure proceedings where a defendant files an answer setting up a mortgage signed by her, but fails to make her a party.⁸ The wife or widow is not entitled to

¹ *Bard v. Poole*, 12 N. Y. 495;
Bloomer v. Sturges, 58 N. Y. 168;
Dalton v. Smith, 86 N. Y. 176; *Wil-*
son v. Giddings, 28 O. S. 554.

² *Hays v. Coal Co.*, 29 O. S. 330.

³ *Ante*, sec. 2.

⁴ *Coe v. Railroad Co.*, 10 O. S. 372;
Pomeroy's Code Rem., sec. 174.

⁵ *Moore v. Starks*, 1 O. S. 369.

⁶ *Ketchum v. Shaw*, 28 O. S. 508.

⁷ *McArthur v. Franklin*, 16 O. S.
 193; *s. c.*, 15 O. S. 485.

⁸ *Parmenter v. Binkley*, 28 O. S. 32.

dower in premises as against a mortgage or lien which attached before the marriage, and in an action against the mortgagor to foreclose such a mortgage his wife is not a necessary party.¹ It is also held that a wife of a guarantee who did not sign the mortgage is not a necessary party, and that she need not be made a party where the mortgage was given to secure purchase-money.² But upon the whole it seems that the wife should be made a party in any case, that her right of redemption may be cut off. Heirs or devisees of a mortgagor must be made parties,³ and a judgment against a deceased mortgagor without the personal representative or heirs being made parties is void.⁴ Where the defendants are infants, some courts hold that the petition should state what their interest is — whether it is paramount or subordinate to plaintiff's mortgage.⁵

In an action of foreclosure against a trustee, the beneficiary or *cestui que trust* is a necessary party;⁶ though it has been held in an action against an executor and trustee of a will of a mortgagor that the *cestuis que trust* are sufficiently represented by the executor and trustee.⁷ Where a trustee brings an action to foreclose a mortgage given for the benefit of creditors, the beneficiaries should be made parties thereto.⁸ An action of foreclosure may be maintained in case of death of the mortgagor before the expiration of the time or the bringing of suits against the estate of the decedent, in which case the administrator and heirs are proper parties.⁹ But an administrator of a mortgagor is not a proper party to the action, where the premises passed from the mortgagor before his death, unless a personal judgment is desired against the estate.¹⁰ A mortgagor who, subsequent to the execution

¹ Wilson v. Scott, 29 O. S. 686; 3 Nev. 57; Moore v. Pope, 97 Ala. 463; Phillipps v. Keels, 4 O. C. C. 816; 11 So. Rep. 840 (1892).

² Ruffner v. Evans, 2 O. C. C. 70; ⁷ In re Booth, 69 L. J. Ch. 40; In re Welch v. Buckins, 9 O. S. 881; Folsom Mitchell, 65 L. T. (N. S.) 851.

v. Rhodes, 29 O. S. 485. ⁸ Kloone v. Bradstreet, 2 Handy,

³ Green v. Ulyat, 3 W. L. M. 44. 74; s. c., 7 O. S. 323; Bank v. Bell, 14

⁴ Craven v. Bradley, 51 Kan. 336; O. S. 200.

s. c., 32 Pac. Rep. 1113 (1893). ⁹ Hathaway v. Lewis, 2 Disn. 260;

⁵ Aldrich v. Lapham, 6 How. Pr. 129. Hall v. Musler, 1 Disn. 86; Cincinnati Savings Co. v. Jones, 4 W. L.

⁶ Hamilton v. Jacobs, 10 Am. Law. B. 475; Hall v. Hall, 3 W. L. G. 82; Rec. 445 (C. S. C.); Mavrich v. Grier, Bateman v. Morris, 7 Oh. Dec. 287.

¹⁰ Puckett v. Reed, 22 S. W. Rep. 515 (Tex. 1893).

of the mortgage, conveys all his interest in the premises to another, is not a necessary party where a simple decree of foreclosure and sale of the premises is sought;¹ nor is a mortgagor who has conveyed the premises to a grantee who assumes the payment of the mortgage indebtedness a necessary party,² unless it is desired to hold him personally in his relation of surety to his grantee. Nor is a mortgagee who assigns the mortgage a necessary party.³ The rights of a junior mortgagee are not affected, even though not a party defendant, in an action by a senior mortgagee, and he may therefore maintain an action against the purchaser to foreclose his mortgage.⁴

To bar prior lienholders who are made parties, the petition must ask that they be required to set up their claims or be barred, which must be followed by judgment ordering a sale free from their claims.⁵ Mortgagees upon a railroad representing bondholders are not necessary parties.⁶ And in an action against a railroad company to foreclose a mortgage, any material-man not an original contractor cannot come in as a party and ask relief as to matters independent of the things in litigation.⁷ Judgment liens acquired during the pendency of an action of foreclosure, though the holders are not parties thereto, are divested by sale of the mortgaged premises under decree in foreclosure.⁸ Where property is sold in foreclosure

515 (Tex., 1893); *Roberts v. Platt*, 42 Ill. App. 608; s. c., 38 N. E. Rep. 434; *United States Security Life Ins. Co. v. Vandergrift*, 26 Atl. Rep. 985 (N. J. Ch., 1893); *Gutzeit v. Pennie*, 98 Cal. 327; s. c., 33 Pac. Rep. 199 (1893).

¹ *Jones v. Lapham*, 15 Kan. 540; *Bigelow v. Bush*, 6 Paige Ch. 343.

² *McArthur v. Franklin*, 15 O. S. 485; s. c., 16 O. S. 193.

³ *Grant v. Ludlow*, 8 O. S. 1; *McGuffey v. Finley*, 20 O. 474.

⁴ *Stewart v. Johnson*, 30 O. S. 24; *Holliger v. Bates*, 48 O. S. 437; *Childs v. Childs*, 10 O. S. 339; *Moulton v. Cornish*, 188 N. Y. 133; *Goodall v. Mopley*, 45 Ind. 355. A late Nebraska case holds that in an action of foreclosure a failure to find the amount

due on a prior mortgage does not prejudice the mortgagor or other parties standing in the same relation to the mortgaged property. *Stratton v. Reisdorph*, 35 Neb. 314. One asserting a right under a mortgage prior to a mortgage involved in foreclosure proceedings should be made a party in order that the priorities may be determined. *Brown v. Volkening*, 64 N. Y. 76.

⁵ *Emigrant, etc. Bank v. Brown*, 75 N. Y. 127. See sec. 574, *post*.

⁶ *Coe v. Railroad Co.*, 10 O. S. 372. ⁷ *Bartlett v. Patterson*, 10 W. L. B. 337.

⁸ *Roberts v. Dorent*, 20 W. L. B. 397 (Franklin Co. C. P.).

proceedings against several persons owning land as tenants in common, each of whom is bound to pay his equal proportion of the debt, a portion of whom buy the same and execute another mortgage to a third person for money borrowed for the purchase of the premises, the latter mortgage may be enforced against that portion of the original owners in common who did not join in the purchase of the premises.¹ Devisees under a will who have an interest in the property should be made parties defendant.² A purchaser assuming payment of a mortgage is a necessary party if the mortgagee desires to take personal judgment against him. And where there are several purchasers, each of whom has assumed the mortgage, all should be joined, as each one, together with the mortgagor, stands in the relation of principal and surety;³ and if the mortgagee seeks to enforce the personal liability existing between such parties, it is necessary, as matter of course, that all should be made parties. But a purchaser who takes property subject to a mortgage merely is not a necessary party if he has parted with the premises, as a personal judgment cannot be obtained against him.⁴ A guarantee of a mortgagor does not lose his right to redemption even though not made a party to the proceedings.⁵ Persons claiming title by virtue of a sheriff's sale, which in fact does not pass title, are not necessary or proper parties to an action to foreclose.⁶

Sec. 572. Limitations to actions to foreclose mortgages.

A rule has been adopted by the supreme court of Ohio with respect to the nature of a mortgage making a radical change in what has been for many years the established practice as to the time within which a proceeding to foreclose shall be brought. The court holds that a mortgage is a specialty, and hence falls within the fifteen-year period of limitation prescribed by the code. This doctrine is placed upon the theory that, as between mortgagee and mortgagor, the title, upon condition broken, rests in the former, and that his right

¹ Rhodes v. Raymer, 6 O. C. C. 68.

⁴ Fargus v. Felthousen, 45 Wis.

² Knierin v. Zaengerle, 10 W. L. B. 30.

293 (Cuyahoga Co. C. P.).

⁵ Childs v. Childs, 10 O. S. 339.

³ Scarry v. Eldridge, 68 Ind. 44;

⁶ Hall v. Yoella, 45 Cal. 534.

Hand v. Hutchinson, 18 J. & S. 335.

still exists, as at common law, to recover possession of the premises as by the old form of action in ejectment; that a sale on foreclosure is not a recovery of real estate.¹ That being the case, it cannot be governed by the statute of limitation relating to recovery of real estate prescribing twenty-one years. This is a logical evolution of the law. Where the mortgagor has died, the action may be maintained against the administrator or executor. The petition in such a case must show that eighteen months have elapsed since the date of the administration bond.² An action, however, against the estate on the notes secured by the mortgage is barred in four years,³ unless it has been presented and allowed by the administrator. But the provisions under which an action on the notes are barred being a part of the administration law are not applicable to foreclosure of the mortgage, which is governed by the more general act concerning the limitation of actions, and the creditor has his remedy in equity.⁴

Sec. 573. Nature of the action — Personal judgment, etc.—The mortgagee at common law had the right to prosecute three actions concurrently, namely, an action to foreclose, a personal action on the debt, and an action in ejectment to recover possession of the mortgaged property.⁵ The mortgagee may still pursue any of the remedies which existed prior to the code, such as ejectment, now recovery of real property, against one claiming to have purchased the premises from the mortgagor,⁶ or an action of forcible entry and detention, notwithstanding the pendency of foreclosure proceedings.⁷ It must now be considered settled that an action to foreclose a mortgage cannot be maintained after the note which it se-

¹ *Kerr v. Lydecker*, 51 O. S. 240; Ch. 380; *Delahy v. Clement*, 3 Ill. 31 W. L. B. 290; *Heighway v. Pendleton*, 15 O. 785; *Allen v. Everly*, 24 O. S. 97; *Hibbs v. Insurance Co.*, 40 O. S. 543-559.

² *Green v. Ulyatt*, 3 W. L. M. 44.

³ R. S., sec. 6113.

⁴ *Fisher v. Mossman*, 11 O. S. 42; *Belknap v. Gleason*, 11 Conn. 160; 9 W. L. B. 220; *Robinson v. Fife*, 3 O. S. 551; *Clark v. Potter*, 32 O. S. 49.

⁵ *Dunkley v. Van Buren*, 3 John.

⁶ *Kerr v. Lydecker*, 51 O. S. 240; 31 W. L. B. 290; *ante*, sec. 572;

Hart v. Blackington, W. 386; *Robinson v. Fife*, 3 O. S. 551.

⁷ *Bridwell v. Bancroft*, 4 W. L. M. 617 (1862).

cures is barred.¹ An action in foreclosure is strictly a proceeding *in rem*, although the plaintiff may proceed against the defendant personally if more desirable. In an action to foreclose a mortgage given to secure payment of money, or to enforce a specific lien for money, the plaintiff may also ask in his petition a judgment for the money claimed to be due; and such proceedings shall be had and judgment rendered thereon as in a civil action for the recovery of money.² This necessarily applies only to those who are personally liable for the debt.³ A personal judgment cannot be had, however, unless the petition contains an express prayer therefor.⁴ The pendency of an action to foreclose a mortgage in which personal judgment is not demanded will not bar another action upon the note alone for personal judgment.⁵ Even where the petition only asks that the mortgage be foreclosed and the property be sold, an amendment may be made so that personal judgment may be obtained.⁶ A widow cannot ask for personal judgment in an action by her for the recovery of her dower in premises which were secured to her by a mortgage executed by a purchaser from her husband, based upon the ordinary defeasance clause of a mortgage.⁷ Nor can personal judgment be rendered against a non-resident defendant who has only been served by publication;⁸ nor can a mortgagee defendant obtain a personal judgment against another co-defendant.⁹ The fact that no indorsement is made upon the summons of the amount of judgment asked for, when the petition contains a prayer for personal judgment, will not render the proceedings erroneous,¹⁰ as it is not necessary to indorse thereon the amount or nature of the claim.¹¹

It is necessary to allege title to the note and mortgage,

¹ Kerr v. Lydecker, 51 O. S. 240; 31 W. L. B. 290.

² O. Code, sec. 5021.

³ Fleming v. Kirkendall, 31 O. S. 568.

⁴ Giddings v. Barney, 31 O. S. 86. For form, see secs. 568, 584. The court may order an execution for any deficiency after the property is exhausted. Giddings v. Barney, *supra*. Personal service must be had. Buckheimer v. Alsdorf, 2 W. L. B. 206.

⁵ Spence v. Insurance Co., 40 O. S. 517.

⁶ Foote v. Sprague, 13 Kan. 155. See Stephenson v. Reider, 2 W. L. B. 335.

⁷ Hardinger v. Zeigler, 6 W. L. B. 326.

⁸ Wood v. Stanberry, 21 O. S. 142.

⁹ Bank v. Fisk, 2 W. L. M. 543.

¹⁰ Conn v. Rhodes, 26 O. S. 644.

¹¹ Larimer v. Clemmer, 31 O. S. 499.

although an averment that a note was duly executed and delivered by the defendant to plaintiff, and that there is due thereon a certain amount, is a sufficient allegation of ownership.¹ But where an action is brought by one who has acquired title to a mortgage by virtue of attachment proceedings, he should plead all necessary facts showing his title.² The action partaking of the nature of an equitable proceeding, the plaintiff may attach interrogatories to his petition.³ But where he desires to ascertain the rate of interest on a claim of a defendant prior mortgagee, the petition must contain an allegation that the mortgaged property is not sufficient to pay both mortgages before he can interrogate as to the rate of interest.⁴ There can be no doubt as to the right to join an action on the note with an action to foreclose.⁵ A mortgage cannot be foreclosed by piece-meal by selling only a portion of the premises which it covers. If this course is pursued by the mortgagee, he waives the lien on the remaining property.⁶ In a suit by a judgment creditor to enforce the same against real estate upon which there is a mortgage, the holder of the mortgage being a party defendant who sets the same up by answer, the suit will be dismissed if it appears that the debtor has other property out of which the judgment can be had.⁷ The assignee of a note and mortgage cannot maintain a personal action on the assignor's guaranty of the collectibility of the note, made at the time of assigning the same, without resorting to the mortgage.⁸ The petition must contain an averment that the debt is due at the time the action is commenced.⁹ And it must also be averred that the mortgage was duly entered of record, although it is said that such an allegation is immaterial as between the mortgagor and mortgagee.¹⁰

Sec. 574. Averments as to liens.—It has been held that an averment that a defendant has or claims to have a lien upon or interest in the premises, the nature of which is not known

¹ *Sommers v. Hawkins*, 1 Clev. Rep. 210; *ante*, sec. 50, p. 50, n. 7.

² *Als Dorf v. Reed*, 45 O. S. 653.

³ *Ante*, sec. 60.

⁴ *Devore v. Dinsmore*, 4 W. L. M. 144. See sec. 60, *ante*.

⁵ *Ante*, sec. 24.

⁶ *Mascarel v. Raffour*, 51 Cal. 242.

⁷ *Lee v. Harback*, 2 W. L. M. 527.

⁸ *Timmerman v. Howell*, 2 O. C. C.

27.

⁹ *Smith v. Holmes*, 19 N. Y. 271;

Wattson v. Thibou, 17 Abb. Pr. 184.

¹⁰ *St. Mark's Fire Ins. Co. v. Harris*.

13 How. Pr. 95; *Budd v. Kramer*, 14

Kan. 101.

to plaintiff, does not state any fact which a defendant lienholder is bound to answer, and in the absence of any other averment or pleading by the defendant, a court cannot render a decree quieting or barring the claim of such a defendant; a decree made upon such pleadings would be a nullity.¹ Without an allegation in the petition in some way controverting or denying the validity of the claim of a defendant, such defendant may assume that his lien is paramount to plaintiff's, and his rights are not therefore affected by the proceedings.² The usual allegation made in such cases, which has been approved by courts and writers generally, is: "That the defendant G. H. has or claims to have some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage of plaintiff."³ There must be an allegation showing that the defendant's claim is inferior to that of the plaintiff. The most usual allegation in Ohio probably is, "that the defendant A. B. has or claims to have some interest or lien upon the property hereinbefore described, which plaintiff asks he may be required to set forth or be forever barred from asserting the same."⁴ The supreme court has recently held, however, that an averment that a co-defendant has or claims to have some interest in or claim upon the mortgaged premises, and advises him that his claim or lien will be barred if he fails to appear and disclose it, is sufficient without averring the character of the interest.⁵ The doctrine of this case, which was a well-considered one, is not in entire harmony with the strict rule announced by other cases considered in this section, and must necessarily supersede all others.

Sec. 575. Allegation of demand.— Whether or not a petition to foreclose a mortgage should aver a demand for pay-

¹Laughlin v. Vogelsong, 5 O. C. C. 407; Spoors v. Coen, 44 O. S. 497. See Blandin v. Wade, 20 Kan. 254; Delahay v. Goldie, 17 Kan. 268; Short v. Nooner, 16 Kan. 220.

²Laughlin v. Vogelsong, 5 O. C. C. 407; Strobe v. Downer, 18 Wis. 11; Lewis v. Smith, 9 N. Y. 502.

³Drury v. Clark, 16 How. Pr. 424; Frost v. Koon, 30 N. Y. 428.

⁴The form in Swan's P. & P., pp. 415, 416, No. 142, has been expressly disapproved by courts in other states.

⁵Winemiller v. Laughlin, 51 O. S. —; 31 W. L. B. 370; Anthony v. Nye, 30 Cal. 401; Poett v. Stearns, 28 Cal. 266.

ment depends entirely upon the conditions or the defeasance clause of the mortgage. If it provides that the note thereby secured shall be paid within a certain time after demand is made, then demand becomes a condition precedent to the right to foreclose, and the petition must, therefore, contain an allegation that a demand has been duly made.¹ But in the absence of any such stipulation in the mortgage itself, or if it be provided merely that, "if the mortgagor shall pay or cause the note to be paid," then a demand of payment is not a necessary condition to a right of action upon the mortgage.² A demand in such a case which is made by an agent of the owner of the note, whose agency is denied, cannot be established by the mere possession of the note by such agent.³ Where the provisions of the note secured by mortgage are such that the same is payable within a certain number of days after demand, the mortgage cannot be foreclosed unless a demand of payment is first made.

Sec. 576. Stipulations as to defaults in payment of instalments and interest.—Interesting questions have arisen upon the construction of stipulations in mortgages which are out of the usual form; as, for example, stipulations as to defaults in the payment of notes, taxes and other conditions. These stipulations are made entirely in the interest of the mortgagee and relate solely to the remedy to be pursued by him.⁴ Where it is provided in a mortgage that if an instalment of interest or principal is not paid at the time stipulated, the holder thereof may elect to declare the whole debt due, an election by the holder must precede an action to foreclose.⁵ Or if the mortgage contain a condition that, in case of default in the payment of any one instalment, the whole debt shall thereby become due, the right to foreclose will accrue at once upon such default before all of the instalments

¹ *Insurance Co. v. Curtis*, 35 O. S. 848; *Bolman v. Lohman*, 79 Ala. 68; *Price*, 8 O. S. 299.

Insurance Co. v. Jones, 35 O. S. 351.

² *Insurance Co. v. Jones*, 35 O. S.

³ *Insurance Co. v. Curtis*, 35 O. S.

351.

357. That a right of action will lie on a note without demand is settled in *Hill v. Henry*, 17 O. 9; *Darling*

⁴ *McClelland v. Bishop*, 43 O. S. 113.

in *Hill v. Henry*, 17 O. 9; *Darling*

⁵ *Randolph v. Middleton*, 26 N. J. Eq. 543.

are due. This is the well-settled practice.¹ Where a mortgage provides that, after the interest thereon falls due and remains unpaid, the holder may elect that the whole debt shall thereby become due, he cannot be compelled, after making such an election, to accept the interest and waive the stipulation.² It may be provided in a mortgage that the same shall become due upon failure to pay taxes or interest, in which case the right to foreclose accrues upon a breach of the condition.³ A right to foreclose has been held to exist where there is a default in the payment of interest, even before the principal becomes due.⁴ Where it is stipulated that the mortgage is not to be foreclosed until the property of the makers of a note is exhausted, and, after judgment has been rendered on the note, it appears that they have no property subject to execution, it cannot be said that the creditor is then bound to exhaust the equities of the judgment debtors before foreclosing the mortgage.⁵ In stating a case where the stipulation in the mortgage is that the mortgagee may elect to declare the whole debt due upon default in the payment of an installment or in interest, the petition should set forth the default, and aver that in consequence thereof the plaintiff elects to declare the whole debt due.⁶ Where the action is to foreclose a mortgage for a failure to pay interest on a note where the note itself is not due, but becomes due during the pendency of the action, a supplementary petition may be filed to have the amount due on the subsequent note determined.⁷

¹ *Bushfield v. Meyer*, 10 O. S. 334; *King v. Longworth*, 7 O. (Pt. 2), 585 (1836); *McClelland v. Bishop*, 42 O. S. 113; *Goodman v. Railroad Co.*, 2 Dian. 180; *Lansing v. Capron*, 1 Johns. Ch. 617; *Bank v. Strong*, 2 Paige, 308; *Fisher v. Millmine*, 94 Ill. 328; *Esterbrook v. Moulton*, 9 Mass. 298; *Dean v. Ridgeway*, 82 Ia. 757; *Vieno v. Gibson*, 20 S. W. Rep. 717 (Tex., 1893); *Grattan v. Wiggins*, 23 Cal. 16. Installments falling due subsequent to the suit may be brought in. *Higgins v. West*, 5 O. 554.

² *Malcolm v. Allen*, 49 N. Y. 448; *Van Doren v. Dickinson*, 33 N. J. Eq. 383.

³ *Poweshiek Co. v. Dennison*, 86 Ia. 244; s. o., 14 Am. Rep. 521; *Buchanan v. L. Ins. Co.*, 96 Ind. 510; *Stanciliff v. Norton*, 11 Kan. 218.

⁴ *Butler v. Blackman*, 45 Conn. 159; *Dederick v. Barber*, 44 Mich. 19. See *Goodman v. Railroad Co.*, 2 Dian. 176.

⁵ *Riblet v. Davis*, 24 O. S. 114.

⁶ *Harper v. Ely*, 56 Ill. 179. Notice of election is necessary. *Jones on Mortgages*, sec. 1182; *Johnson v. Van Velser*, 48 Mich. 208.

⁷ *Glenn v. Hoffman*, 2 W. L. M. 599. This was held in an old supreme court case to be unnecessary. *Drake v. Bracket*, 1 W. L. J. 395.

Sec. 577. Litigating paramount titles.—In states where the code is adopted, the old practice that questions of paramount or adverse title cannot properly be litigated in foreclosure proceedings is adopted.¹ This practice has been doubted, on the other hand, in a state whose jurisprudence is similar to that of Ohio, inclining rather to the view that the consideration of all questions of adverse titles in foreclosure proceedings is more in harmony with the general policy of the code, whose object is to have the whole subject litigated in a single action.²

Sec. 578. Petition of foreclosure by the original mortgagee—Simple form.—

I. The plaintiff, S. B. W., for a cause of action says that on the — day of —, 18—, the said defendants made and delivered to the plaintiff their promissory note of that date, a copy of which is hereto attached, marked "Exhibit A" [or, a copy of which with all the indorsements thereon is as follows]:

The plaintiff says that he is still the owner and holder of said note; that there are no indorsements thereon; and that there is due him from said defendants, upon said note, the sum of — dollars and — cents, which he claims with — per cent. interest thereon from —.

II. For a second cause of action the plaintiff adopts so much of the first cause of action as is contained between the words, "— ——" in the first line, to and including the words "— ——" in the — line thereof, the same as if fully rewritten herein, and says that said defendants, on the — day of —, 18—, to secure the payment of said promissory note set forth in the first cause of action herein, executed and delivered to the plaintiff their certain mortgage deed, and thereby conveyed to the plaintiff, his heirs and assigns, the following described lands and tenements, to wit: [*Description of property.*]

The said mortgage deed contained a condition, in substance, that if the said defendants should pay or cause to be paid the said promissory note to the plaintiff, his heirs or assigns, when the same became due, with the interest, then said mortgage deed should become void, otherwise to be and remain in full force and virtue.

The plaintiff says that by reason of the non-payment of said

¹San Francisco v. Lawton, 18 Cal. Pelton v. Ferrin, 18 Wis. 223; Pomeroy's Code Rem., sec. 834.

465; Cragan v. Miner, 6 C. L. J. 354; Banning v. Bradford, 21 Minn. 308; McCormick v. Wilson, 25 Ill. 274; Eagle F. Ins. Co. v. Lent, 6 Paige, 635; Corning v. Smith, 6 N. Y. 82; See, also, Bayer v. Cockerill, 3 Kan. 282; chapter on Joinder of Actions.

promissory note, and the interest due thereon, the said mortgage deed has become absolute.

That on the — day of —, 18—, at — o'clock —. M., the said mortgage deed was delivered to the recorder of said county for record, and was by him duly recorded on the — day of said month and year, in volume — of the record of mortgages, pages — and —, of said county.

Wherefore the plaintiff prays that the court may determine the amount due him upon said promissory note and render judgment therefor; that said mortgage deed may be foreclosed, the said premises ordered to be sold, and the proceeds applied in payment of said debt, and for all necessary equitable relief.

E. W. T.,

Attorney for Plaintiff.

NOTE.— Adopted from *Niles v. Parks*, 49 O. S. 370.

Appraisal and Sale.— After property has been twice offered and not sold, a new appraisal may be ordered, upon motion of either party. But after it has been three times offered, the court is not authorized to fix an amount for which it can be sold. *Brown v. Insurance Co.*, 6 O. C. C. 62.

Record.— All mortgages take effect from time of delivery to recorder. *Magee v. Beatty*, 8 O. S. 396; *Mayham v. Combs*, 14 O. 428; *White v. Denman*, 1 O. S. 110. Mortgages may be placed on record after death of mortgagor. *Bank v. Dondna*, 8 W. L. B. 789; *Gill v. Pinney*, 12 O. S. 88. Mistakes of recording officer will not affect the validity of the mortgage. *Stanbury v. O'Neil*, 11 W. L. B. 260; *Brown v. Kirkman*, 1 O. S. 116. The lien of a second mortgage first recorded is preferred. *Stansell v. Roberts*, 18 O. 148. An unrecorded mortgage or equitable assignment is good as between the parties, but as to third parties operates only from date of record. *Fosdick v. Barr*, 3 O. S. 471; *Sidle v. Maxwell*, 4 O. S. 236; *Stewart v. Hopkins*, 80 O. S. 508; *Snyder v. Betz*, 2 O. C. C. 484. Notice of prior unrecorded mortgage will not postpone the second mortgage. *Stansell v. Roberts*, 18 O. 148; *Mayham v. Combs*, 14 O. 428. Mortgages have priority of lien in the order of delivery to recorder. *Bercow v. Cockrill*, 20 O. S. 163. A mortgage recorded in deed record is operative against subsequent purchaser without actual knowledge. *Smith v. Smith*, 18 O. S. 532.

Sec. 579. Petition where another party claims to own a portion of the premises, and against other mortgagees.—

The said plaintiff, M. J. S., complains of the said defendant, D. S. B., for that the said defendant, on the — day of —, 18—, at D., Ohio, made his promissory note in writing of that date, and then and there delivered the same to the plaintiff, and thereby promised to pay to the said M. J. S., or order, — dollars and — cents, one year after the date thereof, with interest at — per cent. per annum from date until paid, which period has elapsed; yet the said D. S. B., defendant, has not paid said note, nor the interest thereon, nor any part thereof, and there are no indorsements thereon; a copy of which note is hereto attached and filed as an exhibit [or, which is as follows, to wit]. There is now due to the plaintiff from said D. S. B. thereon the sum of \$—, with interest at — per cent. from —, 18—.

[2. *Formal averments for second cause of action as in ante, sec. 578.*]

The said plaintiff further complains of the said D. S. B., for that the said defendant, in order to secure the payment of said note and the interest thereon, according to the tenor and effect thereof, executed and delivered to plaintiff his certain mortgage deed on the said — day of —, 18—, and thereby conveyed to the said plaintiff in fee-simple, her heirs and assigns, the following described premises, to wit: [*Description of property.*]

Said mortgage deed had a condition thereunder written as follows, to wit: [*Copy condition or substance.*]

The said mortgage deed was left with the recorder of D. county, Ohio, to be by him recorded, at — o'clock —. M., —, 18—, and was recorded —, 18—, in — county, record of mortgages, volume —, page —.

There is due the said plaintiff from the said defendant, D. S. B., on the note and mortgage in the petition described, the sum of \$—, with interest at — per cent. from —, 18—, which the said defendant has failed to pay according to the tenor and effect thereof, by reason whereof said mortgage deed has become absolute.

The said L. B., defendant, at the time said note and mortgage were given, claimed to own the undivided one-fourth of said premises, and now claims some interest in said premises by way of mortgage, the exact nature of which plaintiff is ignorant, and she therefore asks that he be required to answer and set forth his claim or be forever barred.¹

The said defendants, A. C. and N. C., his wife, claim some interest in said real estate, the exact nature of which plaintiff is ignorant, and she therefore asks that they may be required to answer and set forth their claim or be forever barred.

Wherefore the plaintiff prays that an account may be taken by the court of the amount due the plaintiff from said defendant, D. S. B., on said note and mortgage, and that the said D. S. B. be ordered to pay the amount so found due by the court within a short time to be named by the court, and in default thereof that the court order said undivided one-fourth of said premises, or such part thereof, if less than the amount stated in said mortgage deed, owned by said D. S. B., to be appraised, advertised and sold according to law, and the proceeds applied to the payment of the amount so found to be due by the court, and for such other and further relief as the equity of the case may require.

J. H.,

Attorney for Plaintiff.

NOTE.—From *Benton v. Shafer*, 47 O. S. 117

¹ See *ante*, sec. 574.

Sec. 580. Petition by executor of mortgagee against widow and heirs of mortgagor for foreclosure merely.—

That on the — day of —, 18—, W. B. died testate leaving a will which was duly probated by the probate court of — county on the — day of —, 18—, and the said plaintiff was duly appointed and qualified as the executor of the said last will and testament of said deceased, and is still qualified and acting as said executor.

That on the — day of —, 18—, one J. W. B. executed and delivered to the said W. B. his — promissory notes of that date, being for a balance of purchase-money of the tract of land hereinafter described, each of said notes being for the sum of \$—, copies of which are as follows: [*Copy.*]

2. [*Formal averments.*] Plaintiff further says that, to secure the payment of the said notes and the interest thereon as it should become due, the said J. W. B. and the defendant S. F. B., his wife, on the said — day of —, 18—, executed and delivered to the said W. B. their mortgage deed, and thereby conveyed to the plaintiff's said testator, W. B., his heirs and assigns, the following described lands and tenements situated in the county of — and state of Ohio, to wit: [*Description of premises.*]

The condition contained in said deed was in substance that if the said J. W. B. should pay the notes according to the tenor thereof the said deed should be void, otherwise to be and remain in full force and virtue in law.

Plaintiff further says that since the execution of said deed and notes the said J. W. B. departed this life intestate, leaving as his sole heirs and representatives the defendant S. F. B., his widow, and the defendant M. B., an infant child under the age of twelve years.

On the — day of —, 18—, at — o'clock —. M., the said mortgage was delivered to the recorder of — county to be by him entered for record and was recorded in volume — of mortgages at pages — and following.

The said deed has become absolute. There is due and unpaid on the second of said notes the sum of — dollars with interest thereon from the — day of —, 18—. The third mentioned note is due and unpaid, to wit, the sum of — dollars, with interest thereon from the — day of —, 18—, at the rate of — per cent. per annum payable annually. There is due and unpaid for annual interest on the whole of said notes the sum of — dollars with interest thereon from the — day of —, 18—.

There is also due as the annual interest on the sum of — dollars, the principal sum of fourteen of said notes, the sum of — dollars, with interest thereon at the rate of — per cent. from the — day of —, 18—. There is also due on

said principal sum the interest which became due on the — day of —, 18—, to wit, the sum of — dollars, together with interest thereon at the rate of — per cent. per annum, less what interest may be found due on second and third notes aforesaid.

The plaintiff therefore prays that there be an account of the amount due upon the several notes mentioned herein and the interest accrued, that said mortgage be foreclosed, the said premises ordered to be sold, that an order of sale issue to the sheriff to sell the said premises as upon execution, and for such other and further relief as may be proper in the premises.

B. B. K., Attorney.

Sec. 581. Petition where mortgage was taken upon fraudulent representations that there were no other mortgages.—

The plaintiff says: 1st. That on the — day of —, 18—, the defendant R. M. executed to him his two certain promissory notes of that date, copies of each of which are hereto attached, marked Exhibits A and B respectively [*or, a copy of which notes is as follows*]: [*Copy.*]

There is due plaintiff upon said notes the sum of \$— which he claims with interest from —.

[*Formal averments as in ante, sec. 578.*]

2d. On the — day of —, 18—, the defendants R. M. and C. M., his wife, to secure the payment of said two notes and interest thereon, executed and delivered to plaintiff their mortgage deed and thereby conveyed to this plaintiff, his heirs and assigns, the following lands and tenements, situate in the — county of — and state of Ohio, and described as follows: [*Description of lands.*]

3d. The condition contained in said mortgage deed was in substance that if the said — — should well and truly pay the aforesaid promissory note with interest thereon, according to the tenor and effect thereof, to the said — —, his heirs and assigns, then said deed to be void, otherwise to be and remain in full force and virtue in law forever.

4th. On the — day of —, 18—, at — o'clock — M., said mortgage deed was filed in the office of the recorder of — county, Ohio, to be by him entered on record, and on the — day of —, 18—, the same was recorded as required by law.

Plaintiff says that as between him and all the defendants, except B., B. & C., his is the first mortgage and lien upon said described premises and should be paid out of the proceeds arising from the sale of the same.

That sometime in —, 18—, the defendant J. M. executed and delivered to the defendants R. and C. M. a warranty deed for said described premises, and at the time the plaintiff

took his said mortgage on said premises, said J. M. represented to this plaintiff that there was not any lien or mortgage on the same, and plaintiff, relying on the statement so made by J. M. with reference to the same, forbore to make an examination of the record, and was induced to take his said mortgage on said premises by reason of said J. M.'s said representations that said premises were entirely free and clear of all incumbrances, when in fact, plaintiff says, he is advised and believes that there was then and still is a mortgage on the same for about \$—— to the defendants B., C. & C., and plaintiff says he first learned that said representations of said J. M. were untrue on —, 18—.

Plaintiff says the defendant H. S. H. has a mortgage on said premises, or a note secured by the mortgage held by the defendant J. M., but he says that said note and the security for it is the sole and separate property in her own right of the said H. S. H.

The defendants E. and R. S. W. have or claim to have some lien in or upon said lands and tenements, but whatever claim they or either of them have is subsequent to that of plaintiff, and should be postponed to plaintiff's, but the exact nature and amounts of their claims plaintiff is not advised of, and asks proof of the same.

Plaintiff asks that his said mortgage may be foreclosed, the said premises ordered to be sold, and the proceeds arising from such sale applied to the payment of his debt, and that execution be awarded for any balance, and for such other and further relief as he may be entitled to in the premises.

Sec. 582. Petition against defendant holding tax-title deed claimed to be void, and defendant claiming premises under land contract.—

First cause of action:

I. The said plaintiff F. J. complains of the said defendant J. H. H. for this: that there is due him from said defendant — on a promissory note, a copy whereof with all indorsements thereon is hereto attached, marked "Exhibit A," and made a part hereof, the sum of — dollars, which sum plaintiff claims of said defendant with interest thereon at the rate of — per cent. per annum from the — day of —, 18—.

II. That to secure said promissory note the said defendant J. H. H., on the — day of —, 18—, executed and delivered to this plaintiff his mortgage deed of that date and thereby conveyed to this plaintiff the following described premises, lands and tenements, to wit: Situated in the city of —, county of —, and state of Ohio, and known as [*describe property*].

On the — day of —, 18—, at — o'clock —. M., this plaintiff duly delivered said mortgage deed to the recorder of said county of — for record, and the same was by said recorder duly recorded in volume — at page — of the records of said — county.

Said deed had a condition thereunder written that if said —, his heirs, assigns, executors or administrators, should well and truly pay said promissory note according to the tenor thereof to the said plaintiff, his heirs or assigns, then said deed to be void, otherwise to remain in full force and virtue in law.

The condition of said mortgage deed hath been broken and the same hath become absolute for this: that the said — and his assigns have failed to pay said note according to the tenor thereof, but so to do have failed and refused, and there is now due plaintiff on said note and mortgage the sum of — dollars, which sum is due with interest at the rate of — per cent. per annum from the — day of —, 18—, and which is the amount due after giving credit for all payments and the proceeds of the other property in the mortgage described, and is the first lien on said premises. The said defendant M. A. H., wife of J. H. H., released her right of dower in said mortgage deed.

That said —, defendant, claims title to said premises by a tax deed, but plaintiff says that the sale by which he acquired title was defective and void; that the advertisement of the property for sale was insufficient; that no effort was made to collect said tax before sale; that no suit was brought to collect said tax, and that the tax deed is thereby defective and void, and the only claim that the said — has is for the sum of \$—, with interest from —, 18—, as a lien upon said premises.

That said defendant — claims to have some title to said premises by deed from J. H. H., but the same is subsequent to and inferior to plaintiff's claim.

Wherefore the plaintiff prays that said [*defendant having tax title*] and [*defendant claiming property by land contract*] may be required to set up their claims to said premises or be forever barred, and plaintiff prays judgment against said — for the sum of — dollars, with interest at the rate of — per cent. per annum from —, 18—.

Plaintiff prays that the premises in the petition described may be ordered to be sold according to law and the proceeds applied to the payment of plaintiff's claim and costs, and for such other and further relief as equity may require.

W. & S.,

Attorneys for Plaintiff.

Sec. 583. Petition by assignee of notes and mortgage against maker and indorser, for personal judgment and foreclosure.—

I. Plaintiff's cause of action is founded upon a promissory note of which the following is a copy, viz.: [*Set out copy.*]

The following are the only credits and indorsements thereon, viz.: [*Set out credits and indorsements.*]

On the — day of —, 18—, and after said note became due, the said W. D. indorsed and delivered the same to these plaintiffs.

The defendants E. S. and C. C. S. are liable on said note as makers, and the defendant W. D. as indorser. There is due from the defendants to the plaintiffs on said note the sum of — dollars, which he claims with interest from the — day of —, 18—, payable annually.

II. These plaintiffs further say that at the time of the execution of the notes above set forth and to secure the payment of the same and the money stated therein, the said C. C. S. and E. S., his wife, did by their mortgage deed, duly executed and delivered to the said W. D., convey to the said defendant W. D., his heirs and assigns forever, the following real estate situated in the county of —, in the state of Ohio, and in the city of —, and bounded and described as follows, viz.: [*Set out description.*] To have and to hold the same to the said W. D., his heirs and assigns, and to his and their own use and behoof forever. This mortgage deed was given to secure a part of the purchase-money for said premises as is recited therein — which said deed of conveyance had a condition thereunder written whereby it was provided that if the said C. C. S. and E. S. shall pay or cause to be paid unto the said W. D. their seven certain promissory notes of even date herewith, each for the sum of — dollars, payable in — years respectively, and bearing interest at the rate of — per cent. per annum, interest payable annually, when the same became due and payable according to their tenor and effect, then these presents to be void, otherwise to be and remain in full force and virtue.

The said mortgage deed was duly left with the recorder of said county of — on the — day of —, 18—, at — o'clock — M., for record, and was by him duly recorded in the record of mortgages in volume —, at page —, record of mortgages of said — county, Ohio.

That when said promissory notes became due and payable according to the tenor and effect thereof as set forth in the first and second cause of action herein, they were not paid or any part thereof, except the interest thereon for the first year on each of said notes; that there is due and unpaid on each of said notes all interest payable annually — whereby the con-

ant files an answer and cross-petition service should be made the same as upon the original petition, if he is in default. Otherwise a personal judgment cannot be rendered upon a cross-petition without a summons being issued thereon when the defendant is in default for answer to the original petition.¹ Where a judgment is rendered on a note and mortgage against the maker and payee as an indorser, and an order of sale has been made, the same cannot be reversed upon the ground that such payee has not been served with process.² If the defendant is a non-resident, service must be made as in other cases by publication. A judgment in foreclosure against a non-resident mortgagor without constructive service, as required by the code,³ will not bar his equity of redemption;⁴ nor can a personal judgment be rendered against such a non-resident defendant upon constructive service merely.⁵ Where the affidavit upon which service by publication has been made is in proper form, the jurisdiction of the court cannot be collaterally assailed upon the ground that it is false.⁶

Sec. 586. The right to trial by jury.—The question as to whether or not parties in foreclosure have a right to demand trial by jury is often a perplexing one, and has troubled both practitioner and court. There is no difficulty when personal judgment is asked, as the code requires the same proceedings to be had as in a civil action for the recovery of money only,⁷ in which case issues of fact must be tried to a jury unless waived.⁸ It is generally conceded that where questions of fact are presented which, if true, will extinguish the right to foreclose, a trial by jury may be demanded. This doctrine has been expressly laid down, and followed in practice, and yet recent adjudications are apparently at variance with it. A brief review of the cases is made here, reference being made to the chapter in the first volume on the Mode of Trial, where the question is solved. As a legal and an equitable cause of action are joined, it is therefore said that, where a judgment is asked upon the note and for the sale of the

United States district court sitting at Columbus, Ohio, in an action against a clerk for failure to issue summons, decided that under the Ohio statutes it was the duty of the attorney to see that the summons was properly placed in the hand of the sheriff, and that there was no liability on the part of the clerk. Reversed by U. S. Ct. of Appeals. 4 Oh. Leg. News, 175; B. & O. R. R. Co. v Grubbs.

¹ Thatcher v. Dickinson, 3 O. C. C. 144.

² Larimer v. Clemmer, 31 O. S. 499.

³ O. Code, sec. 5048.

⁴ Endell v. Leibrock, 33 O. S. 254.

⁵ Wood v. Stanberry, 21 O. S. 142.

⁶ Laughlin v. Vogel song, 5 O. C. C. 407; Harris v. Hardeman, 14 How. 334; Fowler v. Whitman, 2 O. S. 271; Buchanan v. Roy, 2 O. S. 251.

⁷ O. Code, sec. 5021.

⁸ O. Code, sec. 5021.

mortgaged property, any issue of fact which affects the judgment upon the note is an issue which either party has a right to demand shall be tried to a jury.¹ Yet a trial by jury was denied in an action to subject the estate of a married woman to the payment of a note and for foreclosure.² In another instance, in an action against a defendant grantee who had assumed payment of the mortgage, which was controverted, a demand to trial by jury was made, which the trial court refused. In a *per curiam* report it was stated that in taking an account without a jury, to ascertain how much of the mortgage debt remained unpaid, and in allowing execution against the mortgagor, the trial court did not err.³ In another case, decided by the circuit court of Ohio, upon the same question, in which a defendant mortgagor answered setting up a defense that the mortgage given to the plaintiff to secure a balance of unpaid purchase-money, upon certain misrepresentations for which he claimed damages, the rule was adopted that, where new matter is set up in an answer which states a legal cause of action, which, if established, extinguishes the cause of action set forth in the petition, a right of trial by jury exists.⁴ The converse of this arises where new matter is set up in an action constituting an equitable case, extinguishing a legal cause of action contained in the petition.⁵ In still another case, where the prayer was for an ordinary decree of foreclosure, and the answer of the defendant was that he had paid the mortgage indebtedness, the right to trial by jury was held not to exist.⁶

¹ Ladd v. Jones, 10 O. S. 437 (1859); Brundridge v. Goodlove, 30 O. S. 374 (1876); Kellar v. Wenzell, 23 O. S. 579.

² Avery v. Van Sickle, 35 O. S. 270. This action would be inapplicable under the present state of the law.

³ C. S. & L. Ass'n v. Kreitz, 41 O. S. 143 (1884).

⁴ Sallady v. Webb, 2 O. C. C. 553 (1887, Bradbury, J.).

⁵ Buckner v. Mear, 26 O. S. 514.

⁶ Alsdorf v. Reed, 45 O. S. 653 (1888). Following this case it would seem that the doctrine of the circuit court

case in which it was held that if the legal defense set up were such that, if established, it would extinguish the equitable cause of action, is expressly disapproved. The defense made in this case was, that the mortgage-indebtedness had been paid, which, if true, necessarily ended the whole proceeding. The issues raised by the defendant were in fact submitted to a jury, which found in favor of the defendant, thereby extinguishing the equitable cause of action, and the plaintiff's petition was dismissed. The plaintiff thereupon appealed the

A distinction upon this question is clearly drawn, that if a money judgment will answer the demand, or, in other words, is the principal relief sought, then either party is entitled to trial by jury.¹ But where the relief sought is paramount or goes beyond a mere money judgment, such as sale and distribution of the funds as in foreclosure of a mortgage, then no right of trial by jury exists. Such seems to be the tenor of the more recent decisions upon this question.²

These principles do not conflict with those announced by other cases where the defendant controverts the debt in such a manner that, if he is right in his contention, it completely extinguishes the right or necessity for foreclosure. If there is no debt there can be no foreclosure. This has been so decided by the supreme court of Ohio in an unreported case.³

This is an illustration of the confusion caused by the union of legal and equitable causes of action. There are other cases of similar nature, as where an accounting and a money judgment is asked, or where a reformation of an instrument is asked and a money judgment thereon. It will probably always be a bone of contention until some radical change is made. It cannot reasonably be expected that courts can foresee how decisions will operate upon future cases. Cases may be peculiar and of such a nature that it would be advisable to try the whole case to the chancellor. On the other hand, the questions raised by the answer of the defendant may demand that the questions going to the money judgment

case, the only question there reviewed being as to the right of appeal on the part of the defeated plaintiff. But the court held that neither party had the right to a jury trial. In the opinion of Minshall, J., the difference between these cases, hinging on the prayer is pointed out, as shown in text. 45 O. S. 653.

¹ Dunn v. Kanmacher, 26 O. S. 497; Chapman v. Lee, 45 O. S. 356; Brundridge v. Goodlove, 30 O. S. 374; Averill Coal & Oil Co. v. Verner, 23 O. S. 372.

² Alsdorf v. Reed, 45 O. S. 653; Black v. Boyd, 50 O. S. 46.

³In an unreported case decided by

the supreme court of Ohio June 5, 1894, Black v. Herbert, 81 W. L. B. 343, No. 2921, the defendant in the trial court set forth a claim by way of set-off consisting of rent which he claimed compensated the amount due upon the note secured while in the hands of an intermediate holder. The case was tried to a jury, verdict in favor of defendant. The plaintiff appealed the case to the circuit court, which court dismissed the appeal, whose judgment was affirmed by the supreme court, thus holding that a right of trial by jury existed in a case of this character.

ment would better be submitted to the jury, that it may first be determined whether the plaintiff will be entitled to any equitable relief; and if the answer discloses such a state of facts that the right of equitable relief will not be completely barred, then the case may properly be tried without the intervention of a jury.

It is held in other code states that a jury trial may be had in foreclosure proceedings, upon the theory that it is an action for the recovery of money, though not one for money only.¹

Sec. 587. Sale of mortgaged property.—When a mortgage is foreclosed the sale of premises shall be ordered; and when the same are to be sold in one or more tracts, the court may direct that they be sold in parcels or in one of the tracts as a whole.² As between successive purchasers in fee and for full value of separate parcels of land incumbered by a prior mortgage on the whole, a sale of the same to satisfy a mortgage will be made in the inverse order of alienation.³ When the mortgaged property is situated in more than one county, the court may order the officer in the county where the land is situated to make the sale, or may direct one officer to sell the whole.⁴ An order to sell cannot be made subject to any undetermined indebtedness set forth in the answer and cross-petition of a defendant lienholder.⁵ A judgment creditor who has obtained judgment against a husband cannot enforce the sale of premises upon which the husband and wife have executed a mortgage in order to cut off a right of homestead.⁶ A judicial sale ordered and made in foreclosure proceedings instituted by a mortgagee against the mortgagor alone, after the mortgagor has conveyed his equity of redemption, is not void.⁷

¹ *Clemenson v. Ohandler*, 4 Kan. 558; *Bradley v. Parkhurst*, 20 id. 470. In the case of *Fleming v. Kirkendal*, 12 W. L. B. 26, the defense was made that the debt had been paid. The Pickaway county district court in this case held that the question of payment could be submitted to a jury. This case was affirmed upon other questions in 31 O. S. 568.

² R. S., sec. 5316.

³ *Sternberger v. Hanna*, 42 O. S. 305.

⁴ R. S., sec. 5317.

⁵ *Thatcher v. Dickinson*, 3 O. C. C. 144.

⁶ *Bernsee v. Hamilton*, 6 O. C. C. 487.

⁷ *Childs v. Childs*, 10 O. S. 339.

Sec. 588. Motion to modify and set aside in part decree of confirmation.—

Now comes L. N. P., the purchaser of the property heretofore sold in the above-entitled cause by the sheriff of said county, and moves the court to modify the order of confirmation heretofore made in this respect, to wit: That the confirmation of the sale of the property described as being in section twenty-one (21), town nine (9), range nine (9), in — county, Ohio, be set aside.

NOTE.— From *Niles v. Parks*, 49 O. S. 370. The court has complete power or control over its own orders during the term at which they are entered and may set them aside at its discretion. *Id.*; *Huntington v. Finch*, 3 O. S. 445. This is not lost by a continuance to another term. *Niles v. Parks, supra*; *Bank v. Doty*, 9 O. S. 508. See 6 O. S. 228; 35 O. S. 177. Purchaser may make motion to set aside or confirm a sale. *Reed v. Radigan*, 42 O. S. 294. See 11 O. S. 516-20; 25 O. S. 270. All parties—defendants, plaintiffs and purchaser—may be heard. *Fidely v. Diserens*, 28 O. S. 314; 10 O. S. 557.

Sec. 589. Defenses in foreclosure proceedings.— Defenses to an action in foreclosure, to be available, must be set forth in the answer in such a way as to constitute a complete defense, and none are available which are not so pleaded.¹ Where the mortgaged premises are sold to a person holding a mortgage thereon for purchase-money, in satisfaction of a judgment for a portion of the purchase-money notes which had become due, a sale thereunder cannot be urged as a defense to an action by the assignee of the mortgage for the foreclosure of the same for the remaining notes against the mortgagor and his grantees.² If a mortgagor has sold mortgaged premises to another who has assumed and agreed to pay the mortgage as part of the consideration, and the premises are transferred by such person to still another grantee, upon an agreement that the intermediate grantee will pay off and discharge such indebtedness, the last grantee, in an action by a mortgagee to foreclose, cannot avail himself of a defense that the loan was originally given for a usurious rate of interest, as he was not a party thereto, and does not stand in any relation to the borrower entitling him to make such a defense.³ In an action by a prior mortgagee to foreclose a mortgage on premises which have been conveyed in trust for

¹ *Higman v. Stewart*, 38 Mich. 513;
Mann v. State, 116 Ind. 383; 19 N. E.
 Rep. 181 (1888).

² *Hollister v. Dillon*, 4 O. S. 197.

³ *Jones v. Insurance Co.*, 40 O. S.
 583.

the benefit of creditors, the beneficiaries may set up a defense of usury against such mortgage, even though the trustees under such conveyance fail so to do.¹ Where the petition contains the ordinary allegation with respect to a defendant lienholder, that he claims some lien on the mortgaged premises, and asking that he be required to answer the same, such a defendant cannot, after he has failed to answer, object to a decree in a proceeding in error because it includes usurious interest.² In case the note stipulates that the personal property of the maker must be exhausted before foreclosure, the property of the debtor is regarded as exhausted when he has nothing which can be reached; the creditor is not then bound to bring suit to exhaust the equities of the judgment debtors before foreclosing the mortgage, and no such defense can be made in the action.³ As stated in a preceding section, a demand is not necessary where the conditions are that the mortgagor shall pay or cause the note to be paid at maturity. It is therefore no defense that the mortgagee did not make a demand and give notice of non-payment in order to charge the indorser personally.⁴ Where a person has taken a mortgage of indemnity upon which a judgment has been rendered against such mortgagee on his indorsement in foreclosure proceedings against the lands brought by others, such indemnity mortgagee may, where all parties interested are before the court, require the proceeds of such sale to be applied to the payment of the judgment against him.⁵

It is no defense on the part of a mortgagor that a third party has also brought a similar action against him in a court of concurrent jurisdiction founded upon the same claims set up in plaintiff's petition.⁶ The fact that no written assignment of a junior mortgage has been taken or recorded will not defeat an action by such mortgagee to foreclose the same.⁷ It is a rule that usury may be available as a defense between the immediate parties to a mortgage, but, being personal to the mortgagor, it cannot be set up by one who purchases

¹ *Bank v. Bell*, 14 O. S. 200.

⁴ *Hilton v. Catherwood*, 10 O. S.

² *Hubbell v. Mansfield*, 4 Am. Law Rec. 619 (C. S. C. 1875).

109. See *ante*, sec. 575.

⁵ *Kramer v. Bank*, 15 O. 253.

³ *Riblet v. Davis*, 24 O. S. 114.

⁶ *West v. Morris*, 2 Dian. 415.

⁷ *Holliger v. Bates*, 48 O. S. 487.

property subject to the mortgage lien tainted with usury, as it is thereby waived.¹ But a defendant mortgagor may set up as a defense, by way of counter-claim, damages claimed by him arising upon a contract in part performance of which the mortgage was executed by him;² or he may set up an illegality in the consideration of the mortgage as forbearance to prosecute a criminal prosecution.³ A court will never aid in the foreclosure of a mortgage founded upon an illegal consideration. This defense may not only be made by the mortgagor, but by any one succeeding to his interest as well.⁴ In an action by the vendor against the vendee for the balance of purchase-money, the vendee by way of counter-claim may set up a defense for an unpaid assessment which was a lien on the premises at the time of the conveyance.⁵ A mortgagor may claim as against an assignee of a note and mortgage a defense that the same was procured by fraud;⁶ and he may also claim damages as against the mortgagee for any fraud practiced by him in the sale of the premises.⁷ When fraud is claimed as a defense the answer must clearly set forth the facts constituting the same, and the burden of proof is upon the defendant.⁸ Damages may also be claimed by the mortgagor for fraud on the part of the mortgagee in concealing from him material facts as to the situation and extent of the premises.⁹ An alteration made by a recording officer is in itself harmless, and cannot therefore be urged as a defense to an action to foreclose.¹⁰ Where a demurrer has been sustained to a petition, and an answer and cross-petition with proper averments and prayer have been filed in the same case by other

¹ *Cramer v. Lepper*, 26 O. S. 59; *Bank v. Bell*, 14 O. S. 201; *Green v. Kemp*, 13 Mass. 515; *Jones v. Insurance Co.*, 40 O. S. 583; *Loomis v. Eaton*, 82 Conn. 550; *Austin v. Clitenden*, 33 Vt. 553; *Studebaker v. Marquardt*, 55 Ind. 341; *Shufelt v. Shufelt*, 9 Paige, 137. See sec. 2, *Jones on Mortgages*, sec. 1494.

² *Burckhardt v. Burckhardt*, 36 O. S. 261.

³ *Raquet v. Roll*, 7 O. (Part 1), 76.

⁴ *McQuade v. Rosecrans*, 36 O. S.

442.

⁵ *Craig v. Heis*, 30 O. S. 550.

⁶ *Baily v. Smith*, 14 O. S. 396; *Palmer v. Yates*, 3 Sandf. 187; *Allen v. Shackleton*, 15 O. S. 145.

⁷ *Allen v. Shackleton*, *supra*; *Corneil v. Corbett*, 64 Cal. 197; *Wimer v. Smith*, 22 Oreg. 469.

⁸ *Sloan v. Holcomb*, 29 Mich. 153; *Elphick v. Hoffman*, 49 Conn. 831.

⁹ *Pierce v. Tiersch*, 40 O. S. 168; *Allen v. Shackleton*, 15 O. S. 145;

Baughman v. Gould, 45 Mich. 481.

¹⁰ *Hemstreet v. Kutzner*, 58 Ind. 819.

mortgage lienholders, the court may proceed to determine the rights of the latter, and render judgment, even though the plaintiff does not amend his petition. The court will treat the answer as a cross-petition if not so denominated.¹

Sec. 590. Answer that defendant holds premises under land contract, and that mortgage was given after execution of contract.—

That on or about the — day of —, 18—, defendant purchased the premises in the plaintiff's petition described by a land contract of the defendant J. H. H., and this defendant at once went into possession of said premises and has remained in possession thereof ever since and is still in possession thereof. That said purchase by the defendant of said H. of said premises was long before the plaintiff's mortgage was executed and delivered to him, and he avers that said plaintiff had full knowledge of the fact that this defendant had purchased said premises of said H., and that this defendant was in actual possession thereof, and that he has ever since been in actual possession of the same. That afterwards on, to wit, the — day of —, 18—, the defendant H. and his wife executed a deed to this defendant for said premises in accordance with the terms of said contract, which deed was duly recorded by the defendant. He further said that he had no knowledge whatever of the giving of said mortgage by said H. to the plaintiff at the time said mortgage was given until long after. He further says that said premises were sold for taxes to the defendant C. on or about the — day of —, 18—, and that afterwards, on the — day of —, 18—, a deed was made and executed by the auditor of said county to said — — for said premises, thereby conveying the same to said — —, who afterwards, on the — day of —, 18—, conveyed the same by deed to — — this defendant's wife, who caused said deed to be recorded in the proper office in said county of —, state of Ohio, and who now holds the legal title to said premises. He further says that said premises are now in the actual possession of himself and wife, and have been ever since he purchased said premises of said H. as aforesaid.

The defendant, further answering, says that he paid upon said contract for said land to said H., before he had knowledge that said mortgage was placed on said property, the sum of \$—, and interest, which amount he is entitled to have paid back to him before said mortgage shall be paid; and he avers that said sum so paid is a first lien upon said property and superior to the lien or pretended lien of the plaintiff.

¹ Kloone v. Bradstreet, 7 O. S. 322.

Wherefore, and by reason of the premises, this defendant says that the plaintiff has lost whatever interest it had by virtue of said pretended mortgage, that the plaintiff is not entitled to the relief prayed for by him, and he prays judgment against the plaintiff and for all proper relief.

G. A. G., Attorney.

NOTE.—From *Jaeger v. Hardy*, 48 O. S. 337. Possession of lands by vendee under contract to purchase is constructive notice of contract, and a mortgage placed thereon subsequent thereto by the vendor is subordinate to the vendee's equity. *Id.* Payments made by the vendee with knowledge of the mortgage, however, are made at his peril. *Id.*: 20 O. S. 68; 1 Sandf. Ch. 244; 87 N. Y. 457; 16 S. & R. 286; 1 Warvelle on Vendors, 188. Such purchaser might continue to make payments on purchase-money until the holder of the mortgage asserts his claim; and, before this was done, complete his payments and receive his deed. 48 O. S. 341; 48 O. S. 157.

Sec. 591. Answer asking to have mortgaged premises sold in inverse order of alienation.—

That after the making of the mortgage set forth in said petition, to wit, on the — day of —, 18—, [*the mortgagor*] sold and conveyed to the defendant a portion of said mortgaged premises, described as follows: [*Describe property conveyed.*]

That on the — day of —, 18—, after the sale and conveyance of the above-described real estate to this defendant, said [*mortgagor*] also sold and conveyed an undivided half of the residue of said premises to one E. F.

The defendant therefore prays that the premises still remaining in the name of the mortgagor be first sold under the decree of foreclosure, to satisfy said mortgage indebtedness, and that if the proceeds derived from the sale of such portion remaining in said mortgagor be not sufficient to satisfy said mortgage indebtedness, that the part of said premises sold and conveyed by said mortgagor to E. F. be next sold, and that the premises conveyed to this defendant be not sold unless a deficiency exists after said sales, and said mortgage indebtedness remains unsatisfied.

NOTE.— See *ante*, sec. 587, p. 541, note 3.

Sec. 592. Answer that note bears usurious interest and that payments made thereunder reduce amount due.—

Defendant admits the making and delivery of the note set forth in plaintiff's petition. That at the time of the execution of said note the defendant agreed to pay, and the said plaintiff agreed to receive, for the use of the money which forms the consideration of said note, a higher rate of interest than eight per cent. per annum, as is expressed in said note.

The defendant further avers payment upon said note on the — day of —, 18—, as interest, the sum of \$ — over and above the eight per cent. expressed in said note, all of which was usurious.

That on the — day of —, 18—, this defendant paid to said plaintiff as interest on said note the sum of \$—, of which \$— was usurious. The defendant further avers that on the — day of —, 18—, this defendant paid upon said note, from the proceeds of sale of a portion of said mortgage security, the sum of \$—. This defendant therefore says that by reason of said agreement to pay and said plaintiff's agreement to receive usurious interest, and the payment of usurious interest on the — day of —, 18—, above set forth, there is not due from this defendant to the plaintiff upon said note any greater sum than \$— with — per cent. interest from the — day of —, 18—.

Sec. 593. Answer that notes were without consideration and were purchased after maturity.—

And now comes C. C. S., one of the defendants herein, and for separate answer to the plaintiff's petition says that he admits the execution of said notes at the time and for the amount claimed in plaintiff's petition, but denies that there is any money due or to become due on said notes.

That as a defense to plaintiff's petition this defendant says that said notes were given entirely without consideration, and that this defendant is the husband of E. S., and that he signed said notes entirely without consideration, and that this defendant ought not to be compelled to pay same.

That as a further defense this defendant says that the plaintiff purchased said notes after same became due and payable. The defendant therefore prays to be dismissed from this suit, with his costs.

Sec. 594. Answer and cross-petition setting up judgment lien.—

[*Caption.*]

And this defendant, by way of cross-petition against said plaintiff, says:

1. That on the — day of —, 18—, this defendant, in a certain action in this court, duly and legally recovered a judgment in this court against the defendants J. W. G., H. B. and W. A. C., for the sum of — dollars, and — dollars and — cents costs of suit.

2. That on the — day of —, 18—, this defendant caused an execution to be issued upon said judgment, by the clerk of this court, directed to the sheriff of — county, who, for want of goods and chattels whereon to levy, on the — day of —, 18—, levied the same upon the lands and tenements and real estate in the petition described, which said execution was returned by the sheriff of said county on the — day of —, 18—, for want of time to advertise and sell said real estate; all of which will more fully appear, reference being had to the records of this court in said case.

3. That costs have accrued on said judgment and execution to the amount of — dollars.

4. On the — day of —, 18—, the defendant H. B. paid to this defendant the sum of — dollars and — cents, being the one-third of the amount of said judgment above mentioned; that no other payment has been made on said judgment, and that said judgment and said levy remain in full force, unreversed and unsatisfied (except as to the amount paid by H. B. as above stated), and that said judgment and costs and levy is a legal, valid and subsisting, and the oldest and prior lien, on the real estate in the petition described, and should be first paid out of the proceeds of the sale thereof. This defendant is willing that said real estate may be sold as this court may order and direct.

Sec. 595. Answer that note and mortgage was made to cheat and defraud creditors, and without consideration.—

[Caption.]

Defendant says that at the time of the execution and delivery of the \$— note and mortgage mentioned in said petition by the defendant J. W. G. to the said plaintiff E. M. G., he, the said J. W. G., was insolvent and largely indebted to this defendant upon a certain claim, to wit, the sum of \$—, and largely indebted to others, all of which the said E. M. G. then well knew; and defendant avers that the said note and mortgage mentioned in said petition of plaintiff was executed and delivered to the said E. M. G. by the said J. W. G. for the purpose of cheating and defrauding this defendant and others, the creditors of the said J. W. G., and for the purpose of hindering and delaying said creditors in the collection of their said claims, all of which the said E. M. G. then and at all times well knew; and the said note and mortgage was so executed and delivered without any consideration whatever, and the said E. M. G. took said note and mortgage for the purpose of aiding the said J. W. G. in cheating and defrauding his creditors, and in hindering and delaying them in the collection of their claims, and all of which was done by and between the said J. W. G. and E. M. G. in pursuance of a combination and confederation between them for the express purpose of so cheating, defrauding, hindering and delaying said creditors.

This plaintiff therefore says that the said E. M. G. is not entitled to anything by reason of said note and mortgage, and the plaintiff asks that said note and mortgage be adjudged fraudulent and void.

Sec. 596. Answer and cross-petition by defendant after proceeds are in court, contesting co-defendant's mortgage.—

1. Now comes C. M. O. and by leave of court files his answer and cross-petition herein, and says that on the — day

of —, 18—, J. M. P. made, executed and delivered to the said C. M. O. his promissory note of that date, of which the following is a copy: [*Copy.*]

No payments have been made on said note and there is due thereon to said C. M. O. the sum of \$— with — per cent interest from —, 18—.

2. [*Formal averments.*] At the time of the execution and delivery of said note by said J. M. P., and to secure the payment of the same, said J. M. P. and his wife, O. P., who thereby released her right and expectancy of dower in said premises, made, executed and delivered to said C. M. O. their mortgage deed upon the premises set forth and described in plaintiff's petition and thereby conveyed to defendant said premises. Said mortgage deed had a condition written therein as follows: That if said note should be paid, then said mortgage deed to be void. The said mortgage deed has become absolute; the conditions thereof have been broken. Said mortgage deed was filed with the recorder of — county, Ohio, for record on the — day of —, 18—, and was recorded in volume —, page —, of record of mortgages for — county, Ohio. This defendant further says that said property has been sold by the former order of this court and defendant's lien transferred to the fund now in court, the proceeds of such sale. Defendant further says that the co-defendant, the —, filed its mortgage on the — day of —, 18—, at — o'clock —. M. Said mortgage was made and delivered to said — on the — day of —, 18—, and at said time no deed or conveyance of said property had ever been made to said P., and no conveyance was made to said P. until the — day of —, 18—; that the mortgage of the plaintiff was made as alleged in said petition.

Defendant therefore prays that the court order his claim paid out of the proceeds of such sale, subject only to the claim of the plaintiff that the amount due him upon his mortgage may be found and declared, and for such other relief as he may be entitled to.

Sec. 597. Answer and cross-petition of building association in foreclosure proceedings.—

And now comes the defendant, the H— Building and Loan Association, and for its answer and cross-petition says that it is a corporation duly incorporated under the laws of Ohio. On the — day of —, 18—, the said defendant, J. M. P., executed and delivered to this defendant his certain written obligation, of which the following is a true copy, to wit: [*Copy.*]

The said defendant, J. M. P., has not paid the weekly instalments of dues and the monthly instalments of interest as required by the terms of the aforesaid note, and there is due

and unpaid thereon at this date (—, 18—), for dues \$—, and for interest \$—, making in all the sum of — dollars and — cents.

Section I of article 11 of the constitution of The H— Building and Loan Association provides as follows: "Any member who neglects to pay his weekly dues shall be fined five (5) cents for every default on each and every share. When the fines of a share equal the paid weekly instalments on the same it shall be forfeited by its owner to the association."

The defendant further says that said J. M. P. has failed and neglected to pay his weekly dues as required by said note for the forty-two weeks last past, whereby the said J. M. P. is indebted to this defendant for fines in the sum of — dollars and — cents. Whereupon this defendant says that the said defendant, J. M. P., is at this time indebted to it in the sum of — dollars and — cents for dues, interest and fines called for by said note, and for which amount this defendant asks judgment.

And the said H— Building and Loan Association for a second cause of action says: It embodies in this its second cause of action all the allegations of its first cause of action herein, and further says. That in order to secure the payment of the above note according to its terms, the said J. M. P. and C. P., his wife, executed and delivered to this defendant their certain mortgage deed on the — day of —, 18—, and thereby conveyed to this said defendant the real estate described in the petition of the plaintiff.

On the — day of —, 18—, at — o'clock —. M., said mortgage deed was received by the recorder of — county, Ohio, to be by him entered of record, and was recorded by him on the — day of —, 18—, in volume —, page —, of the records of mortgages of said county. Said mortgage deed contains a condition, the substance of which is that if the said J. M. P. should pay the above-described note according to its terms and the constitution of said The H— Building and Loan Association, then said conveyance should be void. Said mortgage deed has become absolute. The said defendant further says that said mortgage deed is the first and best lien on said premises, and it denies the allegation of plaintiff's petition that said lien is subordinate to the lien of plaintiff's mortgage. Wherefore the said defendant, the H— Building and Loan Association, prays the court to find the amount due it from the said defendant J. M. P., and that unless the said J. M. P. pay or cause to be paid to it the amount so found to be due, an order of sale issue directed to the sheriff of this county, commanding him to appraise, advertise and sell said premises according to law, and apply the proceeds of such sale to the payment of its claim against said J. M. P., and for all such further relief as it may be entitled to.

N. & M., Attorneys, etc.

FORECLOSURE OF CHATTEL MORTGAGE.

Sec. 598. Actions to foreclose chattel mortgages.—It is not necessary here to discuss at length the law upon the subject of chattel mortgages, but only a few incidental matters which may seem pertinent to proceedings in foreclosure. In Ohio a mortgagee of chattels becomes the general owner thereof. Where the mortgaged property is left in the possession of the mortgagor under a power of sale, the transaction is looked upon with suspicion, and is considered void as against creditors.¹ This has been modified, however, to the extent that such a stipulation in a mortgage is not regarded as *per se* fraudulent and void, the question of the good faith of the mortgagor being left to the determination of a jury.² There are certain statutory provisions which must be observed to make a valid chattel mortgage, such as filing and verifying.³ The mortgage must have indorsed upon it a statement under oath of the amount of the claim, that it is just, and given to secure the payment of money, or, if an indemnity mortgage, the liability which it is given to secure must be set forth.⁴ A mortgage given to indemnify the mortgagee against any liability is void as against creditors of the mortgagor, if it does not contain a true statement under oath of the liability.⁵ A defect in the statement cannot be cured by any conditions contained in the mortgage, unless reference thereto is made.⁶ It has been held that an unrecorded mortgage, where recording is necessary, which is free from fraud, creates a valid lien after the death of the mortgagor, as against the administrator, heirs or general creditors.⁷ And so a mortgage is void as against execution creditors who have levied an execution before the mortgage is filed, although the mortgage was executed before the levy of the execution.⁸ A joint mortgage given by several persons, living in different townships,

¹ *Brown v. Webb*, 20 O. 389; *Freeman v. Rawson*, 5 O. S. 1; *Harmann v. Abbey*, 7 O. S. 218; *Collins v. Meyer*, 16 O. S. 547.

² *Kleine v. Katzenberger*, 20 O. S. 110 (1870).

³ R. S., sec. 4154.

⁴ R. S., sec. 4154; *In re Brocamp*, 2 O. C. C. 872.

⁵ *Blandy v. Benedict*, 42 O. S. 295.

⁶ *Blandy v. Benedict*, 42 O. S. 295; *Gardiner v. Parmalee*, 31 O. S. 551; *Hanes v. Tiffany*, 25 O. S. 549.

⁷ *Martin v. Ogden*, 41 Ark. 186.

⁸ *Cass v. Rothman*, 42 O. S. 380.

must be filed in all the townships where the several owners reside.¹ The mortgage to be valid must necessarily be filed with the proper officer.² It must be filed with the clerk of the township where the mortgagor resides at the time of the execution. If a resident of the township where the office of the recorder of the county is, then it should be filed with the recorder. If a non-resident of the state, then it should be filed with the township clerk of the township where the property is situated.³ To preserve the lien the statutory requirement⁴ must be complied with, and the same must be refiled within thirty days next preceding the expiration of one year. A refile before the commencement of the thirty days mentioned in the statute will not be sufficient.⁵ The validity of a mortgage is not revived by having it reverified and refiled after the expiration of the year as against creditors who have taken liens in the meantime.⁶

Other questions as to the right of different mortgagees arise where there has been some defective filing or refile, which depend entirely upon notice. The lien of a defectively filed mortgage is prior to a mortgage which has been subsequently filed with actual knowledge of the former mortgage.⁷ If a mortgagee fails to refile his mortgage within the time prescribed by statute, and another person files a mortgage before the prior mortgage is filed, actual notice by such subsequent mortgagee is necessary to defeat his mortgage.⁸ The remedy which a mortgagee may pursue for the enforcement of his rights is optional. He may prosecute an action at law for the recovery of the debt, or where the mortgage so provides he may, if no objections are made by the mortgagor, enter and take possession of the property and sell the same, applying the proceeds to the payment of the debt;⁹ or if possession of the goods is not yielded by the mortgagor, the mortgagee may prosecute an action in replevin for the recovery.

¹ Aultman v. Guy, 41 O. S. 598.

⁵ Biteler v. Baldwin, 42 O. S. 125.

² R. S., sec. 4150; Wilson v. Lesslie, 20 O. 161; Houk v. Condon, 40 O. S. 569.

⁶ Cooper v. Koppes, 45 O. S. 625.

⁷ Whittaker v. Westfall, 2 O. C. C. 321.

³ R. S., sec. 4151; Curtis v. McDougal, 26 O. S. 66; Houk v. Condon, *supra*.

⁸ Paine v. Mason, 7 O. S. 198; Day v. Munson, 14 O. S. 488.

⁹ Tyson v. Weber, 81 Ala. 470; Barrett v. Hart, 42 O. S. 41.

⁴ R. S., sec. 4155.

ery of the same;¹ or he may prosecute an action to foreclose the mortgage as an ordinary real-estate mortgage. The latter is the more appropriate remedy, and avoids many difficulties which may arise in the action of replevin. It is said that he may pursue all civil remedies at the same time.² The remedy by foreclosure does not seem to have been pursued to any very great extent in Ohio, but rather the action of replevin has been adopted. For that reason we are not aided by decisions in Ohio as to the method of procedure in foreclosing a mortgage, with which remedy only we are here concerned. The reason for the scarcity of decisions, however, may be the fact that the power of sale given in the mortgage has proven a more speedy means of effecting the mortgagee's rights barring the mortgagor's equity of redemption, which has to a great extent superseded the action to foreclose.³ The power to sell being uppermost in the mind when the mortgagor refuses possession, the mortgagee knowing that he is a general owner naturally resorts to replevin. In view of a most excellent chapter upon foreclosure of chattel mortgages in a recent work,⁴ and of the scarcity of material in Ohio, any extended discussion here seems unnecessary. Where a mortgagor dies after the expiration of the time for filing a mortgage and the property is taken possession of and sold by the administrator, the remedy of the mortgagee is to assert a lien against the fund arising from the sale in the hands of the administrator and not an action to foreclose.⁵

In Iowa, where the mortgagor of chattels dies, the mortgagee may, for a breach of its conditions, proceed to foreclose notwithstanding the debt, and is not required to submit to the request of the administrator to adjust and determine his rights.⁶ A court of equity has power to decree the foreclosure of chattel mortgages where it has jurisdiction over the parties and of the subject-matter, even though no provision is made therefor by statute.⁷ It is not necessary to make

¹ See chapter on Replevin, sec. 1078.

⁶ *Cocke v. Montgomery*, 75 Iowa,

² *Cobbey on Chattel Mortgages*, sec. 259.

947.

³ *Briggs v. Oliver*, 68 N. Y. 336.

⁷ *Bank v. Davidson*, 18 Oreg. 57; s. c., 22 Pac. Rep. 517; *McCauley v.*

⁴ *Cobbey on Chattel Mortgages*, ch. 86.

Rogers, 104 Ill. 578; *Briggs v. Oliver*, 68 N. Y. 336; *Charter v. Stevens*, 8

⁵ *Whitely v. Weber*, 2 O. C. C. 336. Denio, 35.

any demand upon the mortgagor or purchaser,¹ nor upon a subsequent mortgagee, before bringing a suit to foreclose.² The petition must contain an averment that at the time the mortgage was executed the chattels mortgaged were the property of the mortgagor.³ A petition asking judgment upon a note, sale of the chattel property mortgaged, and the application of the proceeds to the payment of the debt, sufficiently shows that foreclosure is asked for although the word foreclosure is not used.⁴ Mistakes may, by proper allegations in the petition, be corrected as in other cases, and the mortgage foreclosed as reformed. The right to foreclose a mortgage exists where there is a breach of covenant to insure.⁵ In case of failure of the mortgagee to establish his right to equitable relief he cannot have a judgment for the payment of the debt. A release, however, of the mortgage by the mortgagee will not deprive him of his right to sue for and collect the debt.⁶ An action of debt will not lie on an ordinary chattel mortgage which does not contain any promise, undertaking or covenant to pay the money.⁷ A decree of foreclosure may be had when the court has jurisdiction of the parties, even though the mortgaged property should not be within the jurisdiction. In ordering the sale of the property the rules governing ordinary sales will be observed; but where these rules cannot be applied without defeating the ends of justice they will be disregarded.⁸ The court in such a case will require the defendant to pay the value of the property.⁹ There can be no warranty of title where the sale of the property is made by the mortgagor by virtue of the power given him in the mortgage.¹⁰ The same rule prevails as to foreclosure of chattel as in real-estate mortgages, where the debt is payable in instalments. Upon default of payment of one instalment the right to foreclose for the whole debt accrues; nor is demand for the instalment due a prerequisite to the action.¹¹ A creditor of the mortgagor may seize by legal process the in-

¹ Zehner v. Aultman, 74 Ind. 24.

⁶ Rawson v. Taylor, 30 O. S. 389.

² Means v. Worthington, 22 O. S.

⁷ Larmon v. Carpenter, 70 Ill. 549.

622.

⁸ Means v. Worthington, 22 O. S.

³ Edwards v. Trittip, 62 Ind. 121. 622.

⁴ Graham v. Blein, 8 Wyo. 746

⁹ Gaar v. Hurd, 92 Ill. 315.

(1892).

¹⁰ Harris v. Lynn, 25 Kan. 281.

⁵ Leland v. Colver, 34 Mich. 418.

¹¹ Maddox v. Wyman, 92 Cal. 674.

terest of such mortgagor in the property, and may then sustain an action against the mortgagee to redeem the property. In an action of replevin by such mortgagor against the officer holding the property, such creditor may set up his claim by way of cross-petition.¹

Sec. 599. Petition to foreclose chattel mortgage.—

1. Plaintiff says that there is due him from said defendant on a promissory note the sum of — dollars, with interest from the — day of —, 18—, a copy of which note with all credits and indorsements thereon is as follows: [*Copy of note.*]

2. For a second cause of action plaintiff adopts so much of the first cause of action hereinbefore set forth, beginning with the word “—” in the first line thereof, ending with the word “—” in the — line thereof, the same as if fully here rewritten, and says that on the — day of —, 18—, in order to secure the payment of the said promissory note set forth in the first cause of action, the said defendant G. W. duly executed and delivered to this plaintiff his chattel mortgage, thereby conveying to plaintiff the following chattel property, to wit: [*Description of property.*]

The said chattel mortgage provided that if the said G. W. should well and fully pay to — — his certain promissory notes for the sum of — dollars, dated —, due —, payable to — —, with interest at —, then the said chattel mortgage to be void; otherwise to be and remain in full force and virtue in law.

The said chattel mortgage was on the — day of —, 18—, at — o'clock — M., duly deposited and filed in the office of the recorder of — county, the said mortgagor being a resident of — township, where the office of the county recorder is kept.

The defendant has wholly failed to pay the said promissory note set forth in said first cause of action, or any part thereof, and by reason whereof the condition of said mortgage chattel has been broken.

Wherefore plaintiff asks judgment against the said defendant in the sum of — dollars, with interest at —, from —, and that said property may be ordered sold and the proceeds thereof applied to payment of said plaintiff's claim, and for such other relief as is equitable.

DEED DECLARED A MORTGAGE.

Sec. 600. Action to declare a deed a mortgage.— A deed absolute in form which is in fact intended to secure the payment of money due from the maker to the grantee, in which

¹ Morgan v. Spangler, 20 O. S. 38.

there is an agreement by the grantee to reconvey property to the grantor, is considered an equitable and not a legal mortgage, and the statute as to the recording of mortgages¹ does not govern its validity.² The intention of the parties is the criterion in the determination of this question, and if the deed, though absolute in form, is intended to secure payment of money, and the relation of debtor and creditor exists between the grantor and grantee at the time of its execution, it will be treated as a mortgage.³ It may be shown by the grantee that, although originally a mortgage, the equity of redemption has been released by a parol agreement.⁴ A deed conveying land to a trustee as collateral security for the payment of a debt, with a condition that it shall be void on the payment, with power in the trustee to sell the land and pay the debt in case of failure to pay the indebtedness, is a mortgage.⁵ Where a contract is made and delivered at the time of execution and delivery of a deed, which provides that the grantee will reconvey the premises within a specified time upon repayment of the purchase-money with interest, the deed will be declared a mortgage.⁶ An action may be maintained to declare a deed a mortgage, both against the grantee and parties who have purchased the premises from him.⁷

Sec. 601. Petition to declare deed absolute on its face a mortgage, where there was a verbal agreement to reconvey.—

That plaintiff on the — day of —, 18—, was the owner in fee-simple of the premises hereinafter described.

That on or about —, 18—, the said E. D. D., deceased, signed a note with this plaintiff, as surety, payable to one F. E.,

¹ R. S., sec. 4133.

² Kemper v. Campbell, 44 O. S. 210; R. S., sec. 4134.

³ Slutz v. Desenberg, 28 O. S. 371; Woodruff v. Robb, 19 O. 212. Where mortgages are in effect and form converted into deeds absolute, the form of the conveyance will not change their nature in equity. Wilson v. Giddings, 28 O. S. 554. As to sale of grantor's equity, see Baird v. Kirkland, 8 O. 21.

⁴ Shaw v. Walridge, 33 O. S. 1;

Harrison v. Trustees, 13 Masa. 456; Trull v. Skinner, 17 Pick. 213; Green v. Butler, 26 Cal. 596.

⁵ Woodruff v. Robb, 19 O. 212.

⁶ Marshall v. Stewart, 17 O. 356.

⁷ Kuhn v. Rumpff, 46 Cal. 299. And a purchaser assuming payment of a mortgage is a proper party to such action. C. S. & L. Ass'n v. Kreitz, 41 O. S. 143. Under what circumstances a deed will be declared a mortgage, see Coleman v. Miller, 6 W. L. B. 199.

which said note was for an indebtedness due from plaintiff to said E. That in order to secure the said E. D. D., and to save him harmless against any loss that might or could occur to him by reason of his having signed said note as aforesaid, this plaintiff, on the — day of —, 18—, executed and delivered to the said E. D. D., deceased, a deed absolute upon its face, for a pretended consideration therein expressed of the sum of \$—, and thereby conveyed to the said E. D. D. the following real estate situate in the county of —, in the state of —, and in the city of —, bounded and described as follows: [*Description.*]

That said deed was intended as, was and is in fact, a mortgage; that the consideration therefor was, as hereinbefore stated, to indemnify the said E. D. D., deceased, against any loss that might or could occur to him by reason of his becoming surety on the note aforesaid.

That at the time of the making and delivery of said deed to the said E. D. D., deceased, this plaintiff and the said E. D. D. entered into an agreement and contract, not in writing, to the effect that if this plaintiff should pay the note so as aforesaid made by him to the said F. E., upon which the said E. D. D. became surety, then the said E. D. D., deceased, should thereupon reconvey to this plaintiff the aforesaid premises, which said verbal agreement and said deed were a part of the same transaction. (a)

Plaintiff further says that he paid the said note and indebtedness so as aforesaid due from him to the said F. E., upon which the said E. D. D. became surety, and thereby no loss or damage occurred to the said E. D. D., deceased, and that plaintiff is therefore entitled to have said deed canceled and said premises reconveyed to him.

Plaintiff further says that on the — day of —, 18—, and at divers other times, he applied to said E. D. D. for a reconveyance to him of said premises, which said defendant failed and refused to make.

Plaintiff further prays that said deed of conveyance may be declared to be a mortgage, that the same may be canceled and held for naught, and that the ownership of said premises may be declared to be in this plaintiff [*or, that said defendant be ordered to reconvey said premises to this plaintiff*], and for such other relief as is proper.

NOTE.—The decree may operate as a conveyance. R. S., sec. 5318.

(a) This may be changed where there is an agreement in writing, or where defendant has received rents and profits.

Sec. 602. Reformation of mortgages.—Any mistake in description or execution of a mortgage may be corrected in actions to foreclose, and the lien will attach as of the date of

the execution, and not from the date of reformation.¹ Such a description will be corrected not only against the mortgagor, but also as against attaching judgment creditors of the mortgagee and purchasers under them with notice of such mistake.² A mistake in the name of a party in the mortgage does not affect its validity.³ A mistake in the execution of a mortgage by having only one subscribing witness thereto does not render the same invalid between the parties. It may be reformed in equity, but not so as to defeat a judgment lien.⁴ A mortgage which fails to describe the land intended to be mortgaged may be reformed at any time while the title remains in the hands of the mortgagor,⁵ but it cannot be reformed and foreclosed against a subsequent *bona fide* purchaser, unless he has notice of the mistake.⁶ Attaching creditors of the mortgagor cannot successfully object to reformation.⁷ In foreclosure proceedings, where reformation is sought upon any ground, the evidence should clearly show that a mistake was made.⁸

Sec. 603. Action to redeem mortgage.—The right of a mortgagor or those claiming under him to compel a redemption of the mortgage exists now as formerly. Where the mortgage is given to secure purchase-money, the mortgagor has the same time within which to redeem as if it were given for some other consideration.⁹ A guarantee who has not been made a party to proceedings in foreclosure does not lose his right to redeem.¹⁰ A wife signing with her husband may upon the death of her husband redeem the mortgage, and

¹ *Adams v. Stutzman*, 7 Am. Law Rec. 76 (Holmes Co. C. P., 1878); *Davenport v. Sovil*, 6 O. S. 459.

² *Strang v. Beach*, 11 O. S. 283; *Timmerman v. Howell*, 2 O. C. C. 27; *Wall v. Arlington*, 13 Ga. 88; *Whitehead v. Brown*, 18 Ala. 682.

³ *Dodd v. Bartholomew*, 44 O. S. 171.

⁴ *White v. Denman*, 16 O. S. 59; 1 O. S. 110.

⁵ *Bush v. Bush*, 33 Kan. 556.

⁶ *Pence v. Armstrong*, 95 Ind. 191.

⁷ *Bush v. Bush*, *supra*.

⁸ *Bartlett v. Patterson*, 10 W. L. B. 867.

⁹ *Robinson v. Fife*, 3 O. S. 551 (1854); *Kerr v. Lydecker*, 51 O. S. —; 81 W. L. B. 290. See *ante*, sec. 572.

¹⁰ *Childs v. Childs*, 10 O. S. 839 (1859); *Hess v. Feldkamp*, 2 Disn. 332 (1858); *Stover v. Bounds*, 1 O. S. 107 (1858). And the right may be exercised notwithstanding the consideration of the note was illegal. *Cowison v. Raget*, 14 O. 38. It may be exercised at any time before foreclosure. *Frischee v. Kramer*, 16 O. 125 (1847).

is not barred by a foreclosure against her husband during his life-time to which she was not a party.¹ An heir of an owner of redemption, after an action has been revived against him and decree of foreclosure and sale had, cannot maintain an action against the purchaser to compel the allowance of redemption.² A subsequent purchaser from a mortgagor cannot be allowed to redeem against a purchaser under a judgment on an older mortgage, even though made a party to the proceeding.³ A petition to redeem mortgaged premises, charging that the mortgagor fraudulently stood by and witnessed a purchaser from a mortgagee making improvements, and concealed his lien, is good as against a demurrer.⁴ Time may be given a mortgagor in a decree of foreclosure within which to redeem, which is within the discretion of the court.⁵

¹ *McArthur v. Franklin*, 15 O. S. 485; 16 O. S. 193. ⁴ *Carter v. Longworth*, 4 O. 384.

² *Hentz v. Ward*, 1 C. S. C. R. 387 (1871). ⁵ *West v. Morris*, 2 Disn. 415. And

³ *Hentz v. Ward*, 1 C. S. C. R. 387 (1871). this time may be extended. *Stagg v. Harbeson*, 2 C. S. C. R. 23 (1870).

⁵ *Dennison v. Allen*, 4 O. 495

CHAPTER 38.

FRAUD AND DECEIT—CONSISTING OF FALSE REPRESENTATIONS AND CONCEALMENTS.

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| <p>Sec. 604. Parties to actions for fraud.</p> <p>605. Limitations to actions for fraud.</p> <p>606. Remedy and action for fraud and deceit.</p> <p>607. Principles of pleading.</p> <p>608. Action for deceit or false representation.</p> <p>609. Petition for fraud in obtaining goods under contract induced by fraudulent representations.</p> <p>610. Petition for fraudulent concealment in sale of property.</p> <p>611. Petition to declare subscription to the capital stock of corporation null and void, because of its being procured by false representations, and for the recovery of the amount paid thereon.</p> | <p>Sec. 612. Petition for false representation to purchaser of real estate.</p> <p>613. Petition for false representations as to quality in sale of goods.</p> <p>614. Petition to have judgment by justice of peace, for property fraudulently obtained, declared a charge upon real estate.</p> <p>615. Petition for false representations in exchange of property.</p> <p>616. Petition for false representations made to induce credit.</p> <p>617. Attacking judgments and decrees for fraud.</p> <p>618. Defenses to actions for fraud.</p> <p>619. Defenses to actions for false representations.</p> <p>620. Answer of fraud in procuring a contract.</p> |
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Sec. 604. Parties to actions for fraud.—A person who is not a party to an instrument cannot assail it on the ground of fraud and recover money paid thereon, although he may have caused the same to have been executed between others.¹ A corporation is liable for fraudulent conduct of its agents in the same manner as if such agents had been acting for private persons.² A trustee cannot maintain an action for deceit practiced upon his *cestui que trustent*, nor can he sus-

¹ Insurance Co. v. Wright, 33 O. S. 118; 2 Dian. 302; Bartholomew v. Bentley, 15 O. 659.

² Nugent v. Railroad Co., 8 W. L. G.

tain an equitable action on the ground of fraud.¹ In every such case the person defrauded is the proper party plaintiff.² A wife who executes a deed with her husband which is afterwards fraudulently changed into a mortgage without her knowledge, not being a party to such fraud, may still assert her right of dower in the premises.³ One giving credit to another on the faith of a letter of credit directed to a person other than the one giving credit cannot maintain an action for deceit, though the representations in the letter are false.⁴ Where two persons are induced by false representations to make a purchase of hogs which they divide between them immediately upon purchase, either purchaser may maintain an action for the fraud and deceit against the vendor without joining or making his co-purchaser a party.⁵ The interest or cause of action of such purchasers is several, even though the representations were made to them jointly, thus enabling them to bring separate actions.⁶ It was not proper at common law, nor is it under the code, to join a party who has neither legal nor beneficial interest in the subject-matter of the suit.⁷ If such a vendor has the misfortune to be compelled to answer a claim for damages at the suit of the other injured purchaser, the former is himself responsible for this result. Whatever the ancient rules were, the law in this class of actions has been modified by modern decisions.⁸

Sec. 605. Limitations to actions for fraud.—An action for relief on the ground of fraud must be prosecuted within four years from its commission, though the right does not accrue until the fraud has been actually discovered.⁹ Lapse of time is not available where a person has been misled by misrepresentations, or kept in ignorance of rights by one who ought to have disclosed the same.¹⁰ Nor will it bar the

¹ *Raymond v. Railway Co.*, 21 W. L. B. 103.

² *Eccleston v. Clipsham*, 1 Sand. 154; *Duncan v. Willis*, *supra*.

³ *Raymond v. Railway Co.*, *supra*; *Bigelow* (2d ed.), 214; *Dickinson v. Seaver*, 44 Mich. 624; *Foster v. Wightman*, 123 Mass. 100.

⁴ *Duncan v. Willis*, *supra*; O. Code, sec. 5007.

⁵ *Duncan v. Willis*, *supra*.

⁶ O. Code, sec. 4983. This applies to all classes of actions for fraud.

⁷ *Conover v. Porter*, 14 O. S. 450.

⁸ *McCracken v. West*, 17 O. 16.

⁹ *Williams v. Presbyterian Soc.*, 1

¹⁰ *Duncan v. Willis*, 51 O. S. 433; 32

O. S. 478.

W. L. B. 102. See, also, *Wells v. Cook*, 16 O. S. 67.

rights of an infant or a *cestui que trust*, against whom the statute does not begin to run until his discovery of the fraud.¹ If it appears from the face of the petition that the cause of action accrued more than four years before the action was commenced, it must be averred that the fraud was not discovered until a time within four years before the action is commenced. Such a general averment is sufficient to bring the case within the saving clause of the statute.* If the petition states a cause of action, and contains an averment that the fraud was not discovered until within four years before the suit was begun, an answer charging that the cause of action did not accrue within four years before suit because the same was not committed within that time is insufficient.² It has been held that a petition which alleges that plaintiff did not discover the alleged fraud until within four years before suit brought, as against a demurrer, states in fact that the same could not have been discovered by the exercise of reasonable diligence. Such a petition, if controverted, ought to be met by an answer denying plaintiff's ignorance of the facts constituting fraud. It is the actual discovery of fraud, or what might by the exercise of due diligence have been discovered, which puts the statute in operation.³

Sec. 606. Remedy and action for fraud and deceit.—Fraud consists of any misrepresentation or concealment of a material fact.⁴ The forms adopted in its commission are not important. Schemes of fraud may be so cunningly devised as to blind the eye of justice, but when discovered should not escape condemnation and reprobation. It is therefore necessary to look beneath the surface, and, no matter in what form the same may appear, grant relief.⁵ One who has been defrauded may elect to pursue one of three remedies. He may restore or offer to restore what he has received, elect to rescind the contract, and sue at law for whatever he has parted with; or he may, without restoring what he has received, sue for a rescission, in which case he must allege that he is willing and ready to restore; or, he may elect to stand upon the contract and sue for damages suffered by reason thereof.⁶ An action for fraud and deceit may be brought, notwithstanding the death of the person liable therefor.⁷

¹Long v. Mulford, 17 O. S. 485;
Carlisle v. Foster, 10 O. S. 198.

²Maple v. Railroad Co., 40 O. S. 318.

³Stephenson v. Reeder, 2 W. L. B.
335 (Cin. Super. Court, 1878); Piatt v.
Longworth, 27 O. S. 198.

⁴Griel v. Lomax, 94 Ala. 641.

⁵Zevevink v. Kemper, 50 O. S. 208.

⁶Rice v. Manley, 66 N. Y. 87; Beet-
hoven, etc. Co. v. McEwen, 59 N. Y.
Super. 7 (1892).

⁷Thomas v. Dickinson, 23 N. Y. S.
260; s. c., 67 Hun, 350; Railroad Co.
v. Steinfeld, 42 O. S. 455-6.

⁸R. S., sec. 4975.

There cannot be both an affirmation and a disaffirmance of a contract. A vendor cannot rescind a contract for the sale of real estate on the ground of fraud of the vendee, and retain the property, and then maintain an action for deceit against the vendee.¹ Having once made an election between alternative remedies he cannot revoke the same.² An action for fraud and deceit must be founded upon an existing fact, and cannot be based upon any future occurrence, or upon an act to be done; and the party charged therewith must have had knowledge at the time.³ Where a vendor fraudulently aids one of several purchasers to buy, such purchasers may, on discovering the fraud, elect to rescind and tender a reconveyance.⁴ To set aside an executed agreement there must be actual fraud,⁵ and in order to give rise to a cause of action on account of fraud there must be actual damages.⁶ An act maliciously or fraudulently committed will not furnish a ground of action if it be not of itself unlawful.⁷

A judgment against one of two persons who have fraudulently procured a lien upon a worthless security is not a bar to an action against the other for damages sustained by reason of his participation in the fraud.⁸ An action may be maintained against a debtor who fraudulently represents himself insolvent, thereby inducing a creditor to release an indebtedness for a sum less than its real value.⁹ The liability of one committing fraud by representation is measured by his knowledge of the same. If he makes a statement which he does not know to be true, and which influences another to his disadvantage, it is nevertheless a fraud.¹⁰ But if the representations are believed to be true and there is reasonable ground for such

¹Roome v. Jennings, 21 N. Y. S. 988.

²Degraw v. Elmore, 50 N. Y. 1-3; Kinney v. Keirnan, 49 N. Y. 164; Miller v. Barber, 66 N. Y. 558; Schiffer v. Dietz, 88 N. Y. 300; Strong v. Strong, 102 N. Y. 69.

³Smith v. Bowler, 1 Disn. 520. A statement or representation made subsequent to the execution of a deed cannot affect the title conveyed. Williams v. Mears, 2 Disn. 604.

⁴Yeoman v. Lasley, 40 O. S. 190.

⁵Nugent v. Railroad Co., 2 Disn. 802.

⁶Roome v. Jennings, 21 N. Y. S. 988.

⁷Smith v. Bowler, 2 Disn. 153.

⁸Insurance Co. v. Schidler, 130 Ind. 214.

⁹Edwards v. Owen, 15 O. 500.

¹⁰Nugent v. Railroad Co., 2 Disn. 802; Bullitt v. Farrar, 43 Minn. 8; s. c., 43 N. W. Rep. 566.

belief, there can be no fraud and hence no recovery.¹ And where representations are not made for the purpose of inducing another to act upon them in any matter affecting his own interest, an action for fraud may be maintained thereon.² Proof of general representations by which others than plain³ iff were defrauded may be given in evidence.³ Where a person merely undertakes to repeat what others have told him it does not ordinarily constitute deceit for which an action will lie. So where representations are made in reference to lands, with the understanding that the same are made only upon information by others, there is no liability incurred for a loss occasioned to the party relying upon them.⁴ A transaction with a person who is either an imbecile or possessed of a weak mind, and which has been induced by fraud, imposition or undue influence, will be set aside.⁵ The collection of a note executed by reason of threats of a groundless prosecution will be restrained.⁶ A combination made by parties to prevent competition at a sale of land for taxes, with the understanding that the land purchased is to be afterwards divided, is fraudulent and will be set aside.⁷ If a person purchases goods with no expectation of paying for them, or having no reasonable expectations of being able so to do, the purchase is fraudulent, and the goods may be recovered in proper proceedings by the seller.⁸

Sec. 607. Principles of pleading.— A general averment of fraud is not sufficient. Facts must be set forth showing what the fraud and representation consists of, to enable the court to determine whether or not there is any legal fraud or misrepresentation such as will constitute a cause of action. A simple plea that an act was committed by fraud and misrepresentation is a mere legal conclusion and not the statement of a fact.⁹ While the rule requires that facts constituting fraud

¹ *Taylor v. Leith*, 26 O. S. 428.

² *Wells v. Cook*, 16 O. S. 67.

³ *Edwards v. Owen*, 15 O. 500.

⁴ *Foreman v. Compton*, 4 W. L. B. 489 (Cuyahoga Co. Dist. Court, 1879).

⁵ *Tracey v. Sackett*, 1 O. S. 54-9.

⁶ *James v. Roberts*, 18 O. 548.

⁷ *Ludlow v. Little*, 2 O. 504.

⁸ *Talcott v. Henderson*, 81 O. S. 162;

Willmot v. Lyon, 49 O. S. 296.

⁹ *Derby v. Corlett*, 1 Clev. Rep. 210;

Williams v. Church, 1 O. S. 478;

Great Western Despatch v. Glenney,

10 Am. Law Rep. 572; *Butler v.*

Viele, 44 Barb. 166; *Libby v. Rose-*

krans, 55 Barb. 202; *West v. Wright*.

must be set forth, yet it is held that a minute, detailed statement is not required.¹ It is not necessary to employ the words "fraud" or "fraudulent" to characterize a transaction or specify the ground of belief.² The rule allowing what is known as alternative pleading may be followed in cases of fraud where the plaintiff is not certain in what manner the same was committed.³ To maintain an action for deceit, the plaintiff must allege with reasonable certainty, and be prepared to prove, that the defendant made a representation to the plaintiff intending that he should act upon it; that the same was false; that the defendant, when he made it, knew it to be false, and that the plaintiff, believing such representation to be true, acted upon it, and was injured thereby.⁴ Where the injury complained of is the result of actual combination and fraud, the same should be so averred, not in a general manner, but with the same precision that is required in other averments of fact.⁵ It is also said to be the well-settled rule that a pleading on demurrer is deemed to allege what may be implied from the allegation by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. This has been held applicable to allegations of fraud.⁶ The petition must charge the fraudulent intent in positive terms, that is, that the intention was to deceive, and not leave it to be inferred from the falsity of the facts alleged.⁷

Sec. 608. Action for deceit or false representation.—There is a broad distinction between fraud for which a contract will be set aside, and fraud which will sustain an action

98 Ind. 335; *Bailey v. Ryder*, 10 N. Y. 363; *Fry v. Day*, 97 Ind. 348; *Kraus v. Thompson*, 30 Minn. 64; *Humphrey v. Mattoon*, 43 Ia. 556. A simple allegation of fraud is not sufficient. *Railroad Co. v. Commissioners*, 18 Kan. 169; *Norris v. Scott*, 6 Ind. App. 18; 32 N. E. Rep. 103 (1892). Fraud is not presumed; it must be proved by the one setting it up. *Stitt v. Wilson*, W. 505.

¹ *Whitelsey v. Delaney*, 73 N. Y. 571; *Maxwell on Code Pldg.*, p. 193; *Cummings v. Thompson*, 18 Minn. 246; *Fox v. Webster*, 46 Mo. 181. See *Rote v. Stratton*, 2 O. N. P. 27.

² *Whitelsey v. Delaney*, *supra*; *Maher v. Insurance Co.*, 67 N. Y. 233.

³ *Rassussen v. McKnight*, 3 Utah, 815.

⁴ *Byard v. Holmes*, 34 N. J. L. 296.

⁵ *Williams v. Presbyterian Society*, 1 O. S. 478.

⁶ *Beethoven, etc. Co. v. McEwen Co.*, 59 N. Y. Super. 7; *Marie v. Garison*, 83 N. Y. 23.

⁷ *Bartholomew v. Bentley*, 15 O. 659; *Williams v. Presby. Soc.*, *supra*; *Bank v. Beebe*, 6 O. 497.

for deceit. To recover in an action for deceit there must be either a false representation of a material matter, which induces the party to make a contract, or there must have been some device for the purpose of inducing the same.¹ To constitute fraudulent or false representations so as to furnish ground for the rescission of a contract, they must be both false and fraudulent. If made under an honest belief that they are true, they are not fraudulent; but if untrue statements are made recklessly, without knowledge, they are fraudulent. The principle that a party is liable for a false representation of material facts applies to all those cases where influence is acquired and abused, or confidence is reposed and betrayed. If a person occupying confidential relations to another, knowing that he is trusted, makes a false representation of a material fact, he is responsible for any loss resulting therefrom.² The petition should show that the representations were upon some material fact, which if relied upon would mislead the party. It is not essential to maintain the action that the party making the representations should know the falsity of his statements, as he will be held liable if he had no reason to believe the same were true when he made them, and that they were intentionally made for the purpose of inducing the one to whom they were made to act upon them.³ Representations based merely upon opinion, however, of a fact clearly within the knowledge of both parties, are representations upon which a person has no right to rely, and therefore do not fall within the rule.⁴ Although the rule is well settled that where the representations are merely expressions of opinion there can be no liability, yet where they go beyond this, relief may be had.⁵ Whether or not representations are expressions of

¹ Crowell v. Jackson, 15 N. J. L. J. 28; 27 W. L. B. 26; Cowley v. Smith, 17 Vroom, 882.

² Smith v. Patterson, 33 O. S. 70. See Miller v. Barber, 66 N. Y. 558; Thomas v. Beebe, 25 N. Y. 244.

³ Aetna Ins. Co. v. Reed, 33 O. S. 283. Other cases hold that the party making the representations must have known at the time that they were false, or he must have assumed or intended to convey the impression

that he had actual knowledge of their truth. Marsh v. Falker, 40 N. Y. 562; Chester v. Comstock, 40 N. Y. 575; Hubble v. Meigs, 50 N. Y. 480; Babcock v. Sibley, 82 N. Y. 144.

⁴ Aetna Ins. Co. v. Reed, 33 O. S. 283; Salem India Rubber Co. v. Adams, 23 Pick. 256.

⁵ Ketcham v. Phillips, 1 Clev. Rep. 9; Scrogin v. Wood, 54 N. W. Rep. 487 (Iowa, 1893); Sheldon v. Davidson, 85 Wis. 188; 55 N. W. Rep. 161.

opinion, or the statement of a fact to be relied upon, is a question for the jury.¹ A person is clearly liable for representations made upon information received from another person.² An action for a false representation cannot be founded upon a future occurrence, but must be made in reference to an existing fact.³

A person is not justified in relying upon representations made by an agent of an insurance company to one holding a claim for a loss.⁴ But a member of a corporation who makes a false representation as to the financial condition of the company in order to sell its stock is liable therefor even though the purchaser could have discovered the same by an investigation.⁵ And an action may be maintained against a corporation for the recovery of money obtained by its agents by false representations, and the letters written by a general agent of such company to a local agent may be received as evidence.⁶ An action may be maintained for false representations, although there may have been other co-operative inducements which caused the loss.⁷ A special action on the case may be sustained against a debtor for fraudulently representing himself insolvent, thereby inducing a creditor to discharge a claim against him.⁸ An action may be maintained for damages for false representations as to title in the sale of lands, even though the deed does not contain any covenants in this respect.⁹ A grantor who induces another to purchase real estate by means of false representations as to title, and covenants against all persons claiming under him, is liable where the loss occurs to the grantee by reason of no title being in the grantor.¹⁰ A person seeking a loan, who falsely represents that there are no liens upon the premises and thereby prevents another from making an investigation, when

¹ *Floyd v. Paul*, 10 W. L. B. 14.

⁷ *Bank v. Bank*, 56 Fed. Rep. 139;

² *Foreman v. Compton*, 2 Clev. Rep. 218.

Safford v. Giout, 120 Mass. 20-5; *Matthews v. Bliss*, 23 Pick. 48; *Cooley on Torts* (2d ed.), 587.

³ *Smith v. Bowler*, 1 Disn. 540; *Mo-Cracken v. West*, 17 O. 16.

⁸ *Edwards v. Owen*, 15 O. 500.

⁴ *Ætna Ins. Co. v. Reed*, 83 O. S. 283; *Swimm v. Bush*, 23 Mich. 99.

⁹ *Barnes v. Railroad Co.*, 54 Fed. Rep. 87 (Iowa, 1893).

⁵ *Redding v. Wright*, 49 Minn. 323.

¹⁰ *Saguinn v. Liedentopf*, 54 N. W.

⁶ *U. S. Home & Dower Ass'n v. Kirk*, 9 W. L. B. 48.

Rep. 430.

there is in fact an incumbrance, is responsible for any damages arising therefrom.¹ And although false representations made with reference to value of land may not sustain an action for damages, yet when there are other and additional representations made in that connection as to other material matters, an action will lie.² A person is also liable for false representations made with respect to quality or other matters affecting the value of real estate,³ especially when the value is less than the land is actually worth.⁴ A false representation may consist as well in the concealment of what is true as in the assertion of what is false.⁵ In order to create a liability the representations must have been made for the purpose of inducing another to act upon them in some matter affecting his own interests.⁶ A deed obtained under false representations will be set aside as fraudulent.⁷ At common law, false representations made prior to the execution of a deed did not avoid it, but relief could be had in equity.⁸ Where a false representation as to age is made by a party seeking insurance, the insured cannot take advantage of his own false representations, and claim that the policy of insurance was void, in an action by him for the recovery of premiums paid, upon the company declaring the policy forfeited.⁹ A rescission of a contract made or obtained by false representation can have no effect whatever.¹⁰ And where a person seeks to rescind a contract on the ground of false representation, he must first offer to rescind promptly upon discovering the fraud.¹¹

Sec. 609. Petition for fraud in obtaining goods under contract induced by fraudulent representations.—

[*Caption.*]

That on the —— day of ——, 18——, the said defendants fraudulently combined and confederated together to cheat and de-

¹ *Jenkinson v. Stoneman*, 1 Clev. Rep. 218.

² *Griffing v. Diller*, 21 N. Y. S. 407; 66 Hun, 633.

³ *Stevens v. Allen*, 51 Kan. 144; 32 Pac. Rep. 923 (1893).

⁴ *Williamson v. Woten*, 132 Ind. 202; S. C., 31 N. E. Rep. 791 (1892).

⁵ *Nairn v. Ewalt*, 51 Kan. 355; S. C., 32 Pac. Rep. 1110 (1893).

⁶ *Wells v. Cook*, 16 O. S. 67.

⁷ *Long v. Mulford*, 17 O. S. 485.

⁸ *Williams v. Mears*, 2 Disn. 604.

⁹ *Low v. Insurance Co.*, 6 W. L. B. 666.

¹⁰ *Jones v. Booth*, 38 O. S. 403.

¹¹ *Parmele v. Adolph*, 28 O. S. 10.

fraud the plaintiff, and thereby then and there did, in pursuance of said combination and confederation between them, fraudulently obtain from the plaintiff goods and chattels enumerated, as follows: [*Set them out.*] That at the time said goods and chattels were so fraudulently obtained, plaintiff was a merchant at —, Ohio, and on or about the said — day of —, 18—, said defendant K., with full knowledge on the part of said defendant D., and acting at his suggestion and instigation, came to plaintiff's store in —, and then and there, in order to obtain said goods and chattels, fraudulently and falsely represented to plaintiff that he, said K., the defendant, was a son of C. H. K., of —, and was a partner of said C. H. K., as merchants at —, in the firm name of C. H. K. & Son, said C. H. K. then being known to plaintiff to be responsible [*or whatever the false representations may be*], all of which representations were wholly false, and were known by said defendants, at the time they were made, to be false. That it was not true that said defendant K. was a son of C. H. K. of —, nor was it true that said defendant was then, or ever had been, a partner of said C. H. K., by means of which false and fraudulent representations the said defendant obtained from plaintiff the goods and merchandise hereinbefore specified, which were of the value of — dollars, and have, by reason of their said frauds, subjected said plaintiff to damages, expense, cost and charges, in the sum of — dollars. In addition thereto that said goods and merchandise were, after being so fraudulently obtained from plaintiff, shipped to —, and there received by said D., and by him, as well as by the said K., immediately thereafter exposed to sale at public auction, and some portions thereof, as well as other goods obtained in the same manner, sold at such public auction as rapidly as possible, but before all were sold both defendants left —, and neither one has returned.

The plaintiff avers that the obtaining of said goods in the manner and upon the representations aforesaid was a scheme to defraud plaintiff and others, concocted and carried out by the defendants, and for the pecuniary benefit of both, and that both participated in the proceedings of the fraud, whereby, and by reason of the premises, plaintiff says that he has sustained damages, and that the defendants have damaged him in the sum of — dollars, and that by reason of the premises aforesaid an action has accrued to him therefor against the said defendant.

Wherefore he prays judgment, etc.

NOTE.— From *Dean v. Yates*, 22 O. S. 383.

Sec. 610. Petition for fraudulent concealment in sale of property.—

[Formal averments.]

That on the — day of —, 18—, the plaintiff bought of the defendant a certain horse for the sum of — dollars. At the time of said sale said horse was not sound, but had the heaves, which fact was at that time well known to the defendant and was then unknown to plaintiff, but that said defendant then intentionally, falsely and fraudulently concealed said fact from plaintiff, and thereby sold the said horse to him for the price aforesaid. That said horse, at the time of the said sale thereof, had the heaves, to the knowledge of the said defendant, and was thereby rendered, and has ever since so continued, utterly unfit for use.

Wherefore the plaintiff alleges that he has been damaged in the amount of — dollars, for which amount he demands judgment against the defendant.

Sec. 611. Petition to declare subscription to capital stock of corporation null and void, because of its being procured by false representations; and for the recovery of the amount paid thereon.—

The plaintiff, for his cause of action against said defendant, says:

That the defendant is a corporation created and organized under the laws of the state of Ohio.

That on and prior to the — day of —, 18—, the plaintiff was a resident of P., in the state of P., and was employed as a steel melter; that a short time previous to said — day of —, 18—, the plaintiff, at the request of defendant, came to C., Ohio, for the purpose of seeing the works of defendant, with a view to investing in the stock of said company.

That plaintiff was shown through said works by the president and the secretary and treasurer of said defendant company, and the said works consisted of certain large and convenient lots of ground situated in the city of C., on the line of the C. & P. Railroad, in a convenient and desirable place for such business, and of buildings thereon, and engine, roller, machinery, etc., for the melting and manufacture of steel.

That on the said — day of —, 18—, the said defendant, for the purpose of inducing the plaintiff to invest in said company by purchasing \$— of its stock, and to come to C. and employ his time in said business, made the following representations to plaintiff: *[Specify representations.]*

And the plaintiff says that he relied upon each of the representations above stated and believed them to be true, and without said representations he would not have invested in

said company or purchased any of its stock; but believing and relying on said representations and upon the faith of them, the plaintiff did purchase — shares of \$—— each of the capital stock of said company, and paid therefor the face value thereof in money, to wit, the sum of \$——, to the defendant on the — of —, 18—.

And plaintiff avers that the representations aforesaid were wholly false and were so known to be by the defendant when made, and that they were falsely and fraudulently made for the purpose of inducing him to make said purchase of stock.

That in truth and in fact the defendant did not own the works referred to, but merely rented the land by the year, without any lease in writing or right to remain there longer than a few months, and that said new buildings, engine, rolls, etc., had not been in fact fully paid for; that said company was largely in debt, and in its then condition and with its capital and resources, and burdened and incumbered with debts as heretofore alleged, said company could not and did not pay — per cent. dividends or any dividends whatever; and plaintiff avers that as soon as he learned of the falsity of the above representations he complained to the said defendant, demanded the return of his said money, and offered to surrender up his stock for cancellation; but the said defendant, notwithstanding the premises, refused and still does refuse to cancel said stock or pay back to the plaintiff his money aforesaid, though often requested by plaintiff so to do.

Wherefore the said plaintiff prays that the court will be pleased to decree that the aforesaid subscription of plaintiff to the capital stock of said defendant company was obtained by fraud, and by means of material false and fraudulent representations, and declare the same null and void, and require the defendant to pay to plaintiff the said sum of \$——, for which said sum he asks judgment against the said defendant, with interest thereon from —, 18—, and for such other and further relief as plaintiff may be entitled to receive.

NOTE.—From *Cleveland Crucible Steel Co. v. Murdock*, Supreme Court, unreported, No. 1616.

Sec. 612. Petition for false representation to purchaser of real estate.—

[Formal averments.]

That the defendant, on or about the — day of —, 18—, in consideration that the plaintiff would buy of him a farm situated in the township of —, in the county of —, and state of —, and pay unto him the sum of \$——, by transfer of other real estate and other securities for the same, falsely and fraudulently represented and alleged that the said farm contained — acres of land.

Plaintiff says that he relied upon said representations and

allegations of the defendant, and believed them to be true, and did, upon the faith of said representations, purchase and pay for the said farm at the price above specified. That such representations and allegations were in fact untrue, and that said farm contained only about — acres of land, and that said plaintiff has sustained damages to the amount of \$—.

Wherefore he demands judgment against the defendant for the sum of \$—, and for all other proper relief.

Sec. 613. Petition for false representations as to quality in sale of goods.—

[*Formal averments.*]

That on the — day of —, 18—, plaintiff, at defendant's request, bargained with said defendant to purchase from him the following goods, to wit: [*Specify.*]

That said defendant, to induce the plaintiff to make such purchase, falsely and fraudulently represented said goods to be of the best quality of [*specify goods*], and the plaintiff, relying upon said representations of the defendant, believing them to be true, thereupon purchased said goods for the sum of \$—.

That said [*specify goods*] was not the best quality of [*specify goods*], and was falsely represented by the defendant, but was made from an inferior variety of [*specify*], and was of but little value, all of which the defendant then well knew, but falsely and fraudulently deceived the plaintiff in the sale thereof, to his damage in the sum of \$—.

[*Prayer.*]

Sec. 614. Petition to have judgment by justice of peace for property fraudulently obtained declared a charge upon real estate.—

That on the — day of —, 18—, by the consideration of W. B., a duly elected and qualified justice of the peace of — township, — county, Ohio, he duly recovered a judgment against said H. T. for the sum of — dollars, and — dollars costs of suit, which said judgment is unappealed from, unreversed, unsatisfied and unpaid, and there is now due thereon the sum of — dollars with interest from the — day of —, 18—, and said costs.

Plaintiff says the consideration of said debt was the furnishing by him to said H. T. of lumber and timber for the construction of a dwelling-house upon a lot of land which was, and to this date has been, and still is, owned by E. W. T., wife of said H. T., and is described as follows: [*Describe premises.*]

Plaintiff says that said H. T. obtained said lumber and timber by representing to plaintiff that he was the owner in his own right of said premises, which was then and there relied upon by plaintiff in parting with his property; that said state-

ment was made with the intent and for the purpose of deceiving plaintiff; that said statement was untrue; that in fact said H. T. had no personal property or real estate except some articles of personal property specifically exempt from execution, and has so remained to this date.

Said H. T. having so obtained said lumber and timber used the same in building said house on said land without consideration as between him and his said wife, E. W. T., and with the intent and purpose of defrauding plaintiff of his said claim, and his wife, the said E. W. T., participated in said fraud.

Wherefore plaintiff prays that the amount justly due him, having been determined by the court, the payment of the same and interest and costs of suit may by the order of the court be made a charge upon said premises in the petition described, and said premises, in default of the payment of the amount so found due, may be ordered sold as upon execution at law, and other relief as equity and the case may require.

Sec. 615. Petition for false representations in exchange of property.—

On the — day of —, 18—, plaintiff was the owner and possessed of an equitable interest in and of the following described real estate, situate in, etc.: [*Description.*]

That plaintiff on the date aforesaid, was also the owner and possessed of the following personal property, to wit [*description*], which said personal property he had bought and grown on said — acres of land, and was in the full enjoyment thereof when approached by the said defendant as herein-after set forth.

Plaintiff says that said defendant, L. S. H., on or about the said — day of —, 18—, with corrupt and wicked designs, and with intent to cheat, swindle and defraud this plaintiff out of the personal property aforesaid, as well as plaintiff's equitable interest in said — acres of land, did falsely and fraudulently represent to this plaintiff that he, the said defendant, was possessed of a quantity of land situate in — county, Tenn., consisting of — acres. That said land was improved, had on it a log house, good spring water, good peach and apple orchard, and was good soil and susceptible of a high degree of cultivation, and was well worth — dollars per acre; that the said defendant, desiring to get rid of this lot of land—it being the only remaining lot of a large quantity that he had owned in Tennessee, undisposed of—in order that he might have his property nearer home, offered to exchange the same with plaintiff, so as to give plaintiff a good bargain and enable him to thus obtain a good home, all paid for and unincumbered, that he would make plaintiff a good and valid deed of said — acres of land, and pay plaintiff \$— for plaintiff's said interest in said — acres and the personal

property aforesaid. Plaintiff says that he, relying and confiding in the said false and fraudulent representations of defendant and believing them to be true, did then and there assign all of his said interest in said — acres to defendant, and did then and there deliver to said defendant all of said personal property. Whereupon said defendant agreed to give plaintiff his said deed of said land, and said he would send it to — county, Tenn., and have the same recorded for plaintiff. Plaintiff avers that said defendant never intended to and never did convey said — acres or any other land to this plaintiff; that in truth and in fact, when said defendant made said representations as aforesaid, he did not own, nor was he possessed of, — acres of land in said county in Tennessee, whereon was a log house, good spring water, good peach and apple orchard, improved and susceptible of a high degree of cultivation, or worth \$—— per acre, all of which said defendant at the time he made said representations well knew.

Plaintiff further says that said defendant, immediately on becoming possessed of the property of plaintiff as aforesaid, sold the same and converted the proceeds to his own use, and has paid said plaintiff but \$—— of the \$—— in money which he agreed to pay. Plaintiff says that by reason of the fraudulent, wicked and wrongful acts of said defendant as aforesaid, he and his family were robbed and defrauded out of all their property, and that by reason of the wrongs and fraudulent acts of said defendant as aforesaid, plaintiff has sustained damages in the sum of \$——, for which amount he prays judgment against defendant.

W. C. B.,

Attorney for Plaintiff.

NOTE.—Taken from *Holden v. Belmont*, 32 O. S. 585.

Sec. 616. Petition for false representations made to induce credit.—

That on or about the — day of —, 18—, the defendant, to induce the plaintiff to sell to him on credit certain goods and chattels [*or, wares and merchandise*], to wit: [*state nature of goods*], of the value of — dollars, falsely and fraudulently represented to plaintiff that [*state the representations made*].

That the plaintiff, relying upon these representations of defendant, and believing them to be true, sold and delivered the said good and chattels to the defendant, for which the defendant agreed to pay — dollars.

That the said representations so made by defendant were untrue, and that in truth and in fact [*state in what respect*].

That no part of the price of said goods and chattels has been paid. That by reason of said false and fraudulent representations the plaintiff has been put to great trouble and expense, to wit: [*State damages*].

Wherefore the plaintiff demands judgment against the de

fendant for — dollars and — cents, with interest from the — day of —, 18—, and prays for all other proper relief.

Sec. 617. Attacking judgments and decree for fraud.—

The statutes of Ohio provide that a judgment may be vacated or modified by a court of common pleas or circuit court after the term at which it was rendered for any fraud practiced by the successful party in obtaining the same.¹ This provision, however, is merely a cumulative remedy, and does not include or limit the right of a party to prosecute an original action to impeach a judgment or enjoin its collection upon the ground of fraud.² A petition to vacate a judgment under the statute which alleges that a judgment was rendered by default or answer without defense, upon a demand not based upon contract, discloses fraud upon the part of the prevailing party sufficient to vacate the judgment.³ When a petition is filed to impeach a judgment it must particularly set forth the facts and circumstances which it is claimed constitutes the fraud.⁴ A decree from the bonds of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original bill filed at a subsequent term.⁵ Where a case is submitted to arbitrators, their finding cannot be vacated except on the ground of fraud.⁶ An action for damages cannot be maintained against one on the ground that a judgment was obtained by fraud.⁷

Sec. 618. Defenses to actions for fraud.— The same rules as to pleading facts constituting fraud when affirmative relief is sought in a petition are equally applicable when set up by way of defense.⁸ Where the charge of fraud consists in representing another worthy of credit, the defendant may prove what in his opinion he said the plaintiff was worth prior

¹ O. Code, sec. 5854. See *Fackler v. Relief Society*, 5 W. L. B. 858; *Baldwin v. Sheets*, 89 O. S. 624.

² *Darst v. Phillips*, 41 O. S. 514; *Coates v. Bank*, 28 O. S. 415; *Lieby v. Pock*, 4 O. 489; *Long v. Mulford*, 17 O. S. 484.

³ *Pollock v. Pollock*, 2 O. C. C. 148.

⁴ *Reeder v. Stephenson*, 3 W. L. B. 1120, 1121 (Ham. Co. Dist. Court); *Pendleton v. Galloway*, 9 O. 179.

⁵ *Parish v. Parish*, 9 O. S. 534.

⁶ *Ormsby v. Bakewell*, 7 O. (Pt. 1), 98.

⁷ *McCafferty v. O'Brien*, 1 C. S. C. R. 64.

⁸ See *ante*, sec. 607; *Tucker v. Parks*, 7 Colo. 62; *Gifford v. Carvill*, 29 Cal. 589; *People v. San Francisco*, 27 Cal. 656.

to the time of making the statement charged, in order to repel the imputation of fraud.¹ The law will not permit any one to set up his own iniquity to defeat an innocent person; nor will it grant relief between two persons who are guilty of fraud to aid either to disturb a contract which has been executed, or to perform any part of the transaction remaining.² Where a petition avers that fraud was not discovered until within four years before the commencement of the action, an answer charging that the cause of action did not accrue within four years before suit because the same was not committed within that time is not a good defense.³ An answer to an action upon a note that the same was procured by fraud and without consideration, when it appears from the petition that the note was transferred long before due, the answer not containing an averment of knowledge on the part of the plaintiff of the existence of such fraud, or of want of consideration, is subject to demurrer.⁴ It is no defense to an action for fraud resulting in damages that the fraudulent acts were committed in the capacity of a corporation.⁵ A judgment against an agent for fraud committed while acting in the scope of his agency, on which collection or payment has been made, is not a bar to an action against the principal for the same fraud. The fact that the principal was wholly ignorant of the fraud is immaterial.⁶ A creditor having dealt with parties to a conveyance regarding it as valid, cannot afterwards impeach the same for fraud.⁷ The rule is well settled that fraud cannot be urged as a defense under a general denial.⁸

Sec. 619. Defenses to actions for false representations.—

It is not a good defense to an action for false representations that the same were made in good faith and that the plaintiff had a reasonable opportunity to ascertain their truth.⁹ In an action to recover upon a contract for the sale of land, a de-

¹ McCracken v. West, 17 O. 16.

⁶ Maple v. Railroad Co., 40 O. S. 818.

² Goudy v. Gebhart, 1 O. S. 262;

⁷ Rennick v. Rennick, 8 O. 554.

Nellis v. Clark, 20 Wend. 24.

⁸ Great Western Dispatch
Glenny, 10 Am. Law Rec. 572.

³ Maple v. Railroad Co., 40 O. S. 818.

⁴ Wisenogle v. Powers, 1 Clev. Rep.
141.

⁹ Benjamin v. Mattier, 22 Pac. Rep.
837 (Col., 1896).

⁵ Bartholomew v. Bentley, 15 O.
659; 1 O. S. 88.

fense that the sale was induced by false representation with respect to the property is good.

Sec. 620. Answer of fraud in procuring a contract.—

[*Caption.*]

That the instrument set forth in the complaint upon which this action is founded was procured from the defendant by the plaintiff by fraud and misrepresentation in this: [*State the particular circumstances constituting the fraud.*] That said representations made by the plaintiff were false and untrue, as he then well knew, but the defendant, relying upon the same, executed and delivered said instrument to the plaintiff.

The defendant therefore prays that said instrument may be declared void and be delivered up and canceled.

CHAPTER 39.

FRAUDULENT CONVEYANCES.

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| <p>Sec. 631. Parties to actions to set aside fraudulent conveyances.</p> <p>632. Limitation in actions to set aside fraudulent conveyances.</p> <p>633. Action for relief against fraudulent conveyances.</p> <p>634. Petition by judgment creditor to set aside fraudulent mortgage and to determine priorities of liens.</p> <p>635. Petition to set aside fraudulent conveyance and for sale of premises.</p> <p>636. Petition to set aside fraudulent deeds and mortgages and for sale of premises.</p> | <p>Sec. 637. Petition to set aside a fraudulently confessed judgment and sale thereunder.</p> <p>638. Petition to set aside a pretended sale in fraud of creditors.</p> <p>639. Petition to set aside fraudulent assignment.</p> <p>630. Petition to set aside a fraudulent deed.</p> <p>631. Defenses to actions to set aside fraudulent conveyances.</p> <p>632. Answer by innocent purchaser of mortgage attacked as fraudulent.</p> |
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Sec. 621. Parties to actions to set aside fraudulent conveyances.—By statute a creditor has a right to institute an action to set aside any conveyance made by a debtor to delay, hinder or defraud his creditor, whether actually or only constructively fraudulent.¹ An execution debtor who has levied on land which the judgment debtor has fraudulently conveyed may maintain an action to set the same aside.² And in an action against a vendor and vendee to set aside and cancel a deed for fraud, though both are necessary parties, yet where the relief sought is a cancellation they are not so united in interest as to bring them within the meaning of the code.³ A party to a fraudulent conveyance cannot set up his own fraud to avoid the same, nor can his grantors or his heirs be

¹ Stephenson v. Reeder, 2 W. L. B. 835; Combs v. Watson, 2 C. S. C. R. 523; Jamison v. McNally, 21 O. S. 295.

² Gormley v. Potter, 29 O. S. 597.

³ Moore v. Chittenden, 39 O. S. 563.

heard to aver the existence of fraud to prevent the operation of the doctrine of estoppel.¹ A judgment creditor of an insolvent corporation may maintain an action to set aside a sale made in fraud of creditors, even though the corporation has been dissolved and a receiver appointed.²

Sec. 622. Limitation in actions to set aside fraudulent conveyances.—The same rules as to the limitation of actions as have been heretofore laid down with respect to actions for fraud and deceit apply to actions to set aside a fraudulent conveyance.³ An action to set aside a fraudulent conveyance is barred in four years after the discovery of the fraud;⁴ hence it follows that the petition must, where it shows that the conveyance was made more than four years prior to the action, allege that the fraud was not discovered until within the period of four years.⁵ A petition in which it is sought to set aside a conveyance in fraud of creditors, which upon its face shows that more than four years have elapsed since the execution of the deed, is good if it alleges that there was a lack of knowledge of the fraudulent character until within four years of the time of commencing the action. An exception to the statute of limitation in equity is not as stringent as an express statutory exception.⁶

Sec. 623. Action for relief against fraudulent conveyances.—A conveyance made to defraud creditors is good between the parties. It cannot be avoided by the grantor or his heirs, either at law or in equity.⁷ The doctrine that a conveyance made to defraud creditors is void only as against existing or subsequent creditors was established in Ohio at a very early date,⁸ and has been followed ever since.⁹ It matters not in what form the fraud appears, or the means by which it was accomplished, as equity will look to the substance of the transaction, and grant relief in accordance with

¹ Barton v. Morris, 15 O. 408.

Paige Ch. 195; Field v. Wilson, 6 B.

² Monitor Furnace Co. v. Peters, 40

Mon. 479.

O. S. 575.

³ Zieverink v. Kemper, 21 W. L. B. 212.

⁴ See ante, sec. 605.

⁷ White v. Brocaw, 14 O. S. 839.

⁵ O. Code, sec. 4982.

⁸ Burgett v. Burgett, 1 O. 469.

⁶ Combs v. Watson, 22 O. S. 228;

⁹ C. S. C. R. 523; Carr v. Hilton, 1

⁹ Goudy v. Gebhardt, 1 O. S. 267.

Curtis, 390; Humbert v. Rector, 7 See Beebe's Ohio Citations, p. 118.

the object and purpose of the law;¹ and all acts and conveyances falling within the scope of the statutes regulating transfers or assignments for the benefit of creditors will be declared void.² Relief will not be granted for a mere moral wrong, but only where a person has been misled to his injury, or an unconscionable advantage has been taken of him.³ Wherever a court declares that there is a secret trust connected with a conveyance of real estate, it will, in the interest of creditors, look through the form to the substance and set the conveyance aside if fraudulent.⁴ Such a conveyance cannot be avoided by subsequent creditors unless they can show that there was actual fraud.⁵ A voluntary grantor who has made a conveyance without consideration upon a secret trust cannot ask to have the same set aside.⁶ Nor can a debtor who is induced by false representations on the part of his creditors to assign property by way of security, but in fact to prevent an attachment, to which there is attached a secret trust by which the assignee is to account for the property and save the debtor harmless, maintain an action to recover damages for the fraud.⁷ A voluntary conveyance made to a trustee for the benefit of a creditor, his wife and children, is not fraudulent as against a creditor whose claim was at that time amply secured by a mortgage.⁸ Where a person purchases goods with knowledge that a debtor is effecting the sale to defraud his creditors, the latter may either treat it as void and subject the goods to the payment of their claim, or compel the fraudulent vendee to account for their value.⁹ The property of a failing debtor, in the eye of the law, belongs to his creditors, and any disposition he may make of it should be in consideration of their rights; and a sale made by such a debtor to a person in his employ on credit is void as against creditors.¹⁰ In making a compromise with creditors there must be an

¹ *Booth v. Bunce*, 38 N. Y. 139;
Bloomington v. Stein, 42 O. S. 168,
 172.

² *Bloomington v. Stein*, *supra*. See
Loudenback v. Foster, 39 O. S. 203.

³ *Watson v. Erb*, 38 O. S. 35.

⁴ *Ferguson v. Gilbert*, 16 O. S. 88;
Coolidge v. Melvin, 42 N. H. 510.

⁵ *Webb v. Roth*, 9 O. S. 430.

⁶ *Robinson v. Robinson*, 17 O. S.
 480.

⁷ *Trimball v. Doty*, 16 O. S. 118.

⁸ *Stephenson v. Donahue*, 40 O. S.
 184.

⁹ *Bradford v. Beyer*, 17 O. S. 388.

¹⁰ *O'Connell v. Cruise*, 2 Handy, 163.

equal division; and if there is a stipulation for an additional security in favor of one, without the knowledge of the other, it will be declared void.¹

The policy of the law in Ohio from a very early date has been that a debtor in failing circumstances may prefer one creditor over another.² This doctrine was very decidedly reinforced by a more recent case, which put at rest all doubts upon the question which had arisen in the minds of many.³ Relief has been granted by the legislature by an enactment making all preferences made within ninety days preceding the filing of a deed of assignment void.* A transfer made by a debtor to another, the consideration of which is in whole or in part an obligation for the support of the grantor in the future, is void as against creditors.⁴ No action will lie by an obligee against an obligor on a bond, the consideration of which was a sale made by the former to the latter in fraud of creditors, both having been guilty of fraudulent intent;⁵ and as courts are prone to refuse to aid stale equity, a person thus seeking to rescind a fraudulent conveyance should not be guilty of any unnecessary delay.⁶ It is not essential that a creditor should first exhaust the property of a debtor, or that he should show that he has other property, before he can maintain an action to set aside a fraudulent conveyance.⁷ The question of fraudulent intent is the gist of the action, and to set aside a conveyance or gift upon the ground of fraud, it should appear that the fraudulent intent existed in the mind of the person at the time it was made.⁸ In an action by judgment creditors to set aside a fraudulent conveyance, they cannot set up the fraudulent conveyance for the purpose of barring the debtor's claim to a homestead.⁹ An administrator cannot maintain an action for the recovery of goods trans-

¹ *Moses v. Katzenberger*, 1 Handy, 46. See *Way v. Langley*, 15 O. S. 392.

² *Sack v. Hemann*, 10 Am. Law Rec. 488; s. c., 6 W. L. B. 825. See 23 W. L. B. 161, article Preference, and cases cited.

³ *Cross v. Carstens*, 49 O. S. 548.

⁴ *Krider v. Koons*, 5 O. C. C. 221. See *Morrison v. Morrison*, 49 N. H. 69; *Gunn v. Butler*, 18 Pick. 248.

⁵ *Gebhart v. Gebhart*, 1 O. S. 262.

* 93 O. L. 291.

The law will not aid persons who have transferred property for fraudulent purposes. *Emrie v. Gilbert*, W. 764.

⁶ *Constable v. Weaser*, 7 W. L. B. 118.

⁷ *Westerman v. Westerman*, 25 O. S. 500.

⁸ *Creed v. Bank*, 1 O. S. 1; *Lockwood v. Krum*, 34 O. S. 1.

⁹ *Sears v. Hanks*, 14 O. S. 298.

ferred by his intestate in fraud of creditors.¹ A creditor who files a petition to set aside a fraudulent conveyance and obtains judgment subsequent to the conveyance does not acquire any priority over other creditors.² In an action to set aside a deed claimed to be fraudulent and asking for general relief, the court may, instead of ordering the same to be set aside, decree a reconveyance upon equitable terms.³ A creditor may bring an action to set aside a fraudulent conveyance without first having reduced his claim to judgment.⁴ It is not necessary in Ohio that the petition should contain an averment that a debtor has no property other than that which it is claimed has been conveyed, although it may be a proper subject of inquiry in the case.⁵ Following the well-known rule of pleading fraud, in actions to set aside a fraudulent conveyance the facts must be fully set forth.⁶ The word "fraud" need not be used if the facts alleged constitute fraud.⁷ To enable the creditor to maintain the action it is not essential that he shall have first reduced his claim to judgment,⁸ though it is held necessary elsewhere.⁹

Sec. 624. Petition by judgment creditor to set aside fraudulent mortgage and to determine priorities of liens.—

1. On the — day of —, 18—, at the — term of the court of common pleas within and for the county —, Ohio, the plaintiff recovered a judgment against the defendant, J. W. G., for the sum of \$— debt and \$— costs of suit, with interest at the rate of — per cent. per annum from the date of judgment, according to the stipulations of a certain

¹ Benjamin v. Le Baron, 15 O. 517.

² Stanton v. Keyes, 14 O. S. 448; Sockman v. Sockman, 18 O. 362.

³ Riddle v. Roll, 24 O. S. 572.

⁴ Combs v. Watson, 33 O. S. 228.

⁵ Gormley v. Potter, 29 O. S. 597; Westerman v. Westerman, 25 O. S. 500; Rounds v. Green, 29 Minn. 189. This is not the rule in other states. Boone's Pleading, sec. 149.

⁶ Reed v. Bott, 100 Mo. 62. A general allegation of fraud is not sufficient; the facts must be set out and detailed in the petition. Id.; Bliss on Code Pleading, sec. 211; Smith v. Sims, 77 Mo. 269; Hoester v. Sam-

melmann, 101 Mo. 619. "To say that a man acted fraudulently or improperly, without specifying *what he did*, is equivalent to making the pleader the sole judge of the sufficiency of the pleadings, and substituting his judgment for that of the court. If the *facts* are stated, the legal conclusion follows as night follows day, and so no statement of what conclusion the law draws is necessary." Id. See *ante*, sec. 623.

⁷ Whittlesey v. Delaney, 73 N. Y. 571.

⁸ Combs v. Watson, 33 O. S. 228.

⁹ Boone on Code Pldg., sec. 149, n. 2.

promissory note upon which said action was brought, which said judgment is in full force and wholly unpaid and unsatisfied, and which said term of said court began on the — day of —, 18—, and which judgment is a lien upon the premises hereinafter described.

2. On the — day of —, 18—, the said J. W. G., being then seized in fee-simple of the following described real estate, to wit, situate in the county of — and state of Ohio, and in the township of —, and bounded and described as follows: [*description of real estate*], then conveyed the same by a deed of mortgage to his brother and co-defendant, E. M. G., ostensibly for the purpose of securing a certain promissory note of that date, executed and delivered by the said J. W. G. to the said E. M. G. or order for the sum of \$—, two years after the date thereof, with — per cent. interest thereon from date until paid, which said note and mortgage was in truth executed and delivered by the said J. W. G. to the said E. M. G. without any consideration therefor, but with intent then and there and thereby to cheat, hinder, delay and defraud the creditors of the said J. W. G., and especially the plaintiff, C. C. H., who was at that time a creditor of the said J. W. G., who then owed plaintiff the debt for which said judgment was rendered; all of which facts were then and there well known to the said E. M. G. at the time of his taking said note and mortgage.

3. The plaintiff further avers that at the time of the making of said mortgage the said J. W. G. was in failing circumstances, and thereby conveyed and incumbered all of the real estate of which he was then possessed, without consideration as aforesaid, with intent to cover the same up, and place it beyond the reach of his creditors, and reserved no estate whatever out of which plaintiff's claim could be made, or can be made, and is now wholly insolvent.

4. On the — day of —, 18—, and while the actions were pending against him in which the judgments aforesaid were rendered, he, the said J. W. G., executed and delivered to W. H. S. his deed of assignment, and thereby conveyed the premises aforesaid, being all the real estate of which he was then possessed, together with all his personal estate and property, for the use and benefit of the creditors of him, the said J. W. G., which said deed was duly filed in the probate court of — county, Ohio; and the said W. H. S. duly qualified as such assignee, and has been acting as such ever since. The plaintiff further says that he called upon the said W. H. S., as such assignee, and requested him to commence an action in this court for the purpose of setting aside the fraudulent mortgage and conveyance aforesaid, and to ascertain validity, amounts and priorities of the claims and liens of the creditors of said J. W. G. upon said premises; but he absolutely refused

so to do, and still refuses, and will not give his consent to be made a party plaintiff to this action for that purpose, and he is for that reason made a party defendant to this action.

Said W. H. S., as such assignee, on the — day of —, 18—, filed his petition in the probate court of said county of —, in which petition he asked for an order to sell the real estate described in the petition of the plaintiff in this action, which said real estate had come to him, the said S., under and by virtue of said assignment, for the purpose of being administered and applied to the payment of the debts of said assignor. Plaintiff says that he asked leave to be made a party defendant in said action with leave to answer, which leave was by said court refused.

The defendants N. G., C. G., etc., claim some interest and lien upon said premises, the precise nature of which is unknown to the plaintiff; he therefore asks that they be required to answer touching the premises, and to specially set forth the nature and character of their respective claims and liens upon said premises.

5. The plaintiff therefore prays that the said mortgage deed may be declared fraudulent and void to all intents and purposes; that the amount and priorities of the claims and liens of the plaintiff and the several defendants may be found and definitely fixed and declared by the court, and that the defendant W. H. S., as assignee, may be enjoined and restrained from proceeding to sell said real estate upon his said petition until the final hearing of this action, and until the said cloud is removed from said title, and for such other and further relief as equity and the circumstances of the case may require.

NOTE.—From *Holmes v. Gardner*, Supreme Court, unreported, No. 2063.

Sec. 625. Petition to set aside fraudulent conveyance and for sale of premises.—

The said plaintiffs say that on the — day of —, 18—, R. L. W., J. W. R. and L. P. recovered judgment in the court of common pleas of — county, Ohio, by the judgment of said court at its — term, 18—, to wit, —, 18—, in their favor against G. H., in a certain action therein pending against him and others, of which he had due notice, for the sum of \$— debt and \$— costs, which judgment remains unpaid, unreversed and in full force; and that said L. P. sold and transferred to the said plaintiffs his interest therein, who now own the same.

That on the — day of —, 18—, the plaintiffs caused a writ of execution to issue out of said court of — county, Ohio, by its clerk directed to the sheriff of said county of —, directing him to levy upon and sell of the property of the

said H. sufficient to pay said judgment and \$— costs, upon which writ the sheriff of said county of — made his lawful levy —, 18—, upon the interest of said H., to wit, the undivided — of the J. H. farm in said county of —, of about — acres, hereafter described, which farm descended to the heirs of said J. H. at the time of his death, about the — day of —, 18—, one of whom was said G. H.

That soon after his father's death the said G. H., to wit, on the — day of —, 18—, without any valuable or sufficient consideration, and for the purpose of placing said property beyond the reach of his creditors, and hinder the said plaintiffs in the collection of their said judgment, conveyed the said land to his brother-in-law, A. C. D., who by deed on the same day, without any valuable consideration, and for the purpose aforesaid, conveyed said land to M. J. H., wife of said G. H., who, as plaintiffs are informed and believe, and aver, now holds the legal title subject to the rights of the plaintiffs therein.

That by virtue of said judgment and levy, and all of the premises, the plaintiffs hold and have a lien on said land for the payment of said judgment and costs, and have a right in equity to have said lands sold to pay the same, and which they cannot, by reason of the said conveyances made for the purpose aforesaid, now obtain by sale on said execution.

Said farm is described as follows, viz.: Situated in the county of —, and state of Ohio, and bounded and described as follows: [*Description.*]

The said G. A. has not any other property or real estate unincumbered liable to sale on execution to pay said judgment; and was insolvent until said real estate descended to him upon the death of his father.

Wherefore the plaintiffs ask that said defendants be made parties by summons, and that, on final hearing, an order of sale be granted plaintiffs for the sale of said premises, if the said defendants fail for such time as the court may order to pay said judgment and costs and increased costs, and that such other and further relief be granted to them as law and equity may authorize.

NOTE.—From *Holland v. Woodburn*, Supreme Court, unreported, No. 1855.

Damages.—If one by fraud has been induced to purchase property at a price beyond its value, the rule of damages is the difference between the represented and the actual value at the time of the purchase. *Wilkinson v. Root*, W. 686. Proof of fraud must be clear. *Christmas v. Spink*, 15 O. 600.

Sec. 626. Petition to set aside fraudulent deeds and mortgages and for sale of premises.—

Said plaintiff alleges that on — —, 18—, said A. C. A. and E. P. A. executed and delivered to him their promissory note of that date, and thereby promised to pay to him \$—

in one year after date, with interest at — per cent. per annum from the date of said note; on which no interest has been paid except to —, 18—, and no part of the principal. And on —, 18—, they executed and delivered to him another note of that date, and thereby promised to pay to plaintiff \$— in one year after date, with interest at — per cent. per annum, on which no payment has been made. Copies of said notes are hereto attached and made a part of this petition. Payment of the amount due on said notes has been duly demanded by plaintiff of the makers of said note. And plaintiff alleges that at the following dates said E. P. A. was the owner and seized in fee-simple of the following described real estate situate in — county, Ohio, at which date he conveyed the said premises to the following named persons. That when said conveyances were made said E. P. A. was wholly insolvent and said conveyances were made with the intent and for the purpose of hindering, delaying and defrauding his creditors, including said plaintiff, and the same were made without any adequate consideration, to wit: On —, he owned and conveyed to said G. A. R. the following real estate situate in — township and described as [description]. On — he owned and conveyed to said A. H. the following real estate situate, etc. [description].

For the further purpose of defrauding said creditors, including said plaintiff, said E. P. A., on —, 18—, without adequate consideration, executed a mortgage to said L. E. on said lots —, which was filed for record and is recorded in mortgage record book No. —, p. —; and in addition thereto said L. E. holds a chattel mortgage upon a large amount of personal property, amply sufficient to secure his entire claim against said A. C. and E. P. A., said property consisting of: [Description.] Said mortgage was duly filed for record in the office of the township clerk of — township, in said county, where said A. C. A. resided at the time of its execution. It was executed by said A. C. A.

Said G. H. & Co. hold a mortgage on said lots —, and said K. executed a mortgage to said A. C. A. on part of said property.

Said M. A. is the wife of said A. C. A., and said S. A. is the wife of said E. P. A. Said other defendants claim some interest in said property, but have none. Said A. C. A. and E. P. A. are insolvent.

Wherefore the plaintiff demands that said fraudulent conveyances and said mortgage to E. be set aside, that said real estate may be sold to pay said indebtedness, and for other proper relief.

J. & J.,

Attorneys for Plaintiff.

NOTE.— From *Pendry v. Allen*, error to circuit court of Hamilton county, Ohio, Supreme Court, unreported case, No. 1887.

Sec. 627. Petition to set aside a fraudulently confessed judgment and sale thereunder.—

[*Caption.*]

That the plaintiff, at the — term of the — court of common pleas of — county, Ohio, in the year 18—, recovered a judgment against C. D., defendant, for the sum of \$—, which judgment still remains in full force and is unsatisfied.

That on the — day of —, 18—, the plaintiff caused an execution to be issued out of said court against the property of said C. D., which execution on the — day of —, 18—, was by the sheriff of said county returned wholly unsatisfied, and there is now due to the plaintiff on said judgment the sum of \$—.

That said C. D., from the date of the conveyance hereinafter mentioned continuously until the present time, has been and now is wholly insolvent.

That on the — day of —, 18—, before the entry of plaintiff's judgment, but after the indebtedness upon which it was rendered had accrued, said defendant C. D. authorized two judgments, for \$— each, to be entered against him by confession in the court of common pleas of — county, Ohio, in favor of G. H., defendant, upon a pretended indebtedness for money alleged to have been loaned by G. H. to C. D.

That on the — day of —, 18—, executions were duly issued out of the said — court upon said judgments, which, for want of goods and chattels of said C. D. whereon to levy, were duly levied upon the following described real estate belonging to said C. D., viz.: [*Describe premises.*] Said premises were sold in said proceeding under said levy to G. H. for the sum of — dollars, and that amount thereof credited on said judgment.

That said judgments were fraudulently confessed by said C. D. to said G. H. for the sole purpose, on the part of both, of covering up the property of said C. D. and defrauding the plaintiff. Said C. D. was not indebted to G. H. in any sum whatever at the time of the confession of said judgments, and there was no consideration whatever for the same.

Plaintiff therefore prays that said judgments may be declared fraudulent and void as to creditors and that said lands be subjected [*or, and that a receiver may be appointed by the court to whom said defendant shall be directed to convey said real estate, and who shall be directed to sell the same and apply the proceeds; or so much thereof as may be necessary*] to the payment of the plaintiff's judgment, and for such other relief as is just and equitable.

NOTE.— In *Clapp v. Nordmeyer*, 25 Fed. Rep. 71, a firm knowing themselves to be insolvent, with a view of disposing of all their property, confessed judgments in favor of creditors, which were held fraudulent preferences.

Sec. 628. Petition to set aside a pretended sale as in fraud of creditors.—

[*Caption.*]

[*Averment of nature of claim, etc., as in ante, sec. 624.*]

That on the — day of —, 18—, said [*judgment debtor*] was engaged in selling lumber at —, and was possessed of about — feet of lumber of all kinds, of the value of about — dollars, but was then, and so remained continuously until the present time, and now is, insolvent, and unable to pay his creditors in full.

That on said day said [*judgment creditor*], for the purpose of defrauding his creditors, made a pretended sale of said lumber to E. F., taking his promissory notes therefor, said E. F. well knowing that the object of said [*judgment debtor*] in selling said property was to hinder, delay and defraud his creditors.

That said E. F. is wholly insolvent, and has no means with which to pay said notes except such as he may derive from the sale of said lumber.

That said judgment remains wholly unpaid, and there is due thereon from the [*judgment debtor*] to the plaintiff the sum of — dollars.

That the property so assigned to said E. F. is of the value of about — dollars.

Plaintiff therefore prays that said assignment and transfer of said lumber to E. F. may be declared fraudulent and void as against said plaintiff, that a receiver may be appointed to take charge of said lumber and sell the same, and out of the proceeds thereof pay said judgment and costs, and that until final hearing in this cause said defendants, and each of them, be enjoined from selling or disposing of said lumber, or any part thereof, and for such other relief as justice and equity may require.

Sec. 629. Petition to set aside a fraudulent assignment.—

[*Formal averment of claim as in ante, sec. 624.*]

That on the — day of —, 18—, and after the recovery of said judgment, the defendant [*judgment creditor*] assigned all his property, of about the value of \$—, to C. D. in trust for the payment of his debts.

That said [*judgment debtor*] is not indebted to E. F., one of the creditors mentioned in the assignment, in any sum whatever, and his claim for the sum of \$— is fictitious and is inserted merely for the purpose of enabling said [*judgment debtor*] to retain a large portion of the proceeds of the sale of said property.

That the whole amount of *bona fide* claims against said [*judgment debtor*] is about the sum of \$—.

That said assignee had full knowledge of the fraudulent character of said assignment at the time he accepted said

trust, and has collected money and other property from the assets of said assignor of the value of \$——.

That said [*judgment debtor*] at the time plaintiff recovered his said judgment had, nor at any time since then, and now has, no other property than that included in said assignment, and the same was made by the defendant [*judgment debtor*] with the intent to hinder, delay and defraud creditors, and he still retains possession of said property under a pretense that he is the agent of said O. D.

That no part of said judgment has been paid, and there is due thereon from the defendant to the plaintiff the sum of \$——.

Plaintiff therefore prays that said assignment may be declared fraudulent and void, and that said defendants may be required to account for all of said property received by them, and that a receiver may be appointed to take possession and dispose of said property and apply the proceeds thereof, or so much as may be necessary, to the payment of the plaintiff's judgment, and for such other relief as justice and equity may require.

Sec. 630. Petition to set aside fraudulent deed.—

[*Formal averment of claim, as in ante, sec. 624.*]

That they are copartners in the wholesale notion business in the city of ——, under the name, firm and style of B. & C., and that a certain E. F. was and is now engaged in the retail dry goods and notion business in said city, and during the present year and prior thereto has become largely indebted to plaintiffs for goods sold by them to him.

That said indebtedness being long overdue, the plaintiffs brought suit thereon in the —— court of —— county, Ohio, against the said E. F., and on the —— day of ——, 18——, obtained judgment against him for \$—— and costs, and on the —— day of ——, 18——, they caused an execution on the said judgment to be issued to the sheriff of —— county, Ohio, and the same was levied on certain real estate in the city of ——, of said county of ——, to wit: [*description*], then and for a long time previously in the possession of the said E. F.

That the said real estate, and all the right, title and interest of the said E. F. therein, was on the —— day of ——, 18——, sold under said execution to satisfy said debt, and the plaintiffs became the purchasers thereof, and thereafter received from the sheriff of said county a deed therefor.

That at the time of the institution of the plaintiff's suit and down to the day before they obtained judgment thereon, the said E. F. was seized and possessed in fee-simple of the said premises, but that on said day before the plaintiffs obtained judgment, to wit, on the —— day of ——, 18——, the said E. F., for a pretended consideration of —— dollars, conveyed the said real estate by a deed of that date to a certain G. H.

That notwithstanding the said conveyance the said E. F. has since continued, and still continues, to live on and occupy the premises described in said deed.

That at the time of his making said deed the said E. F. was largely indebted and insolvent, and had not the means of paying his said debt apart from the property so conveyed by him, and since said conveyance has been possessed of no other property whatever; and that the said conveyance was fraudulently made and for simulated and pretended considerations, and was made to hinder, delay and defraud the plaintiffs and his other creditors of their just and lawful debts.

Wherefore the plaintiffs pray that the said deed from the said E. F. to the said G. H. of the said real estate may be declared to be void, and may be vacated and annulled, and that the plaintiffs may have such other and further relief as their case may require.

Sec. 631. Defenses to actions to set aside fraudulent conveyances.— Where a grantee by the fraud of his confederates obtains from another a deed for property, but, instead of having it recorded, sells the property to an innocent purchaser and makes a deed direct from himself to the purchaser, destroying the unrecorded deed, and obtains a new and defectively executed deed from his grantee, thereby securing the consideration, he is estopped from disputing the title of such innocent person to the land.¹ An answer by an heir to whom lands were fraudulently transferred by judicial sale to a petition to have the same set aside for fraud, alleging that expenditures for the benefit of the estate have been made and asking to be compensated for the same out of the proceeds of sale, is good as against a demurrer.² It may be shown under a general denial that a transfer was fraudulent and void as against creditors.³ And so the defendant may show, under a general denial, that the property was his homestead.⁴

Sec. 632. Answer by innocent purchaser of mortgage attacked as fraudulent.—

Defendant says that on the — day of —, 18—, said E. M. G., the mortgagee to whom the premises described in plaintiff's petition were conveyed by said mortgage, for a valuable consideration sold, transferred and assigned, by an indorsement written on said mortgage, the said mortgage so made by the said J. W. G. to E. M. G. to B., C. & Co., with the interest and all rights thereafter to accrue thereon, who

¹ Wilson v. Hicks, 40 O. S. 418.

² Bailey v. Swain, 45 O. S. 657.

³ Bomberger v. Turner, 18 O. S. 263.

⁴ Hibben v. Soyer, 38 Wia. 319.

at the time of said sale and transfer had no notice, knowledge or information that any one claimed that said mortgage was made to hinder, delay or defraud the creditors of J. W. G. or either of them, or that it was made for that purpose.

On the same day said B. C. & Co., for a valuable consideration then paid them by W. T. G., sold, transferred and assigned, by written memorandum, said — dollars of said mortgage, in writing, to said W. T. G., who at the time of said sale had no notice, knowledge or information that it was claimed, or that said mortgage was executed by said J. W. G., and received by said O. M. G., for the purpose of hindering, delaying or defrauding the creditors of said J. W. G., or either of them; and on the — day of —, 18—, the said W. T. G., for a valuable consideration then paid to him by J. G., sold, transferred and assigned, by a written memorandum, said — dollars of said mortgage to said J. G., who also had no notice, knowledge or information that said mortgage was claimed to have been made, or was made, for the purpose of defrauding the creditors of said J. W. G.

On the — day of —, 18—, the executors of said J. G., deceased, said executors being thereunto duly authorized, for a valuable consideration then paid to them by this defendant, sold, transferred and assigned — dollars of said mortgage to this defendant, by a written memorandum on said mortgage, and this defendant at the time had no notice, knowledge or information that said mortgage was executed for the purpose of hindering, delaying or defrauding the creditors of said J. W. G., or either of them. And so this defendant says that he, and those under whom he claims, are innocent purchasers of the interest which he now holds under said mortgage in the premises described in plaintiff's petition, for a valuable consideration, and without notice of any infirmity or defect in the title of said E. M. G. in said premises, from whom they purchased the interest aforesaid.

Defendant therefore prays that said petition, as to him, be dismissed, and that he recover his costs.

CHAPTER 40.

GAMING.

Sec. 633. Parties to the action.

634. What constitutes gaming.

635. Action under gaming statutes.

636. Same continued — The petition.

637. Petition for recovery of money lost at gaming.

Sec. 638. Another form of petition for recovery of money lost at gaming.

639. Petition for the recovery of money lost on a wager.

640. Petition to enforce the lien of a judgment rendered under gaming statute.

Sec. 633. Parties to the action.— Any person who loses money or anything of value at gaming,¹ or one who is in any degree dependent for support on or entitled to the earnings of the loser,² may bring an action to recover money so lost. If the loser fails to sue, a third person may bring an action and recover against the winner for the use of the person prosecuting.³ And one who merely furnishes money to another for the purpose of betting, and is present at the game at which the money was lost, may recover as though he had himself lost the money.⁴ In an action for money lost at gaming it is improper to join the owner of the building with those concerned in the game.⁵ An indorsee of a check given for money lost at a game of cards cannot recover on it against the drawer, even though a *bona fide* holder for value,⁶ as the transaction falls within the statute relating to gaming. It has been held that the right of action for money lost at gaming is assignable, and not the mere personal privilege of the loser.⁷ Members of a copartnership may join in an action to recover property lost by one of them at wagering, even without the knowledge of the other.⁸ A right of action will not

¹ R. S., sec. 4272.

² R. S., sec. 4271.

³ R. S., sec. 4273.

⁴ Mead v. McGraw, 19 O. S. 55.

⁵ Smith v. Wyatt, 2 C. S. C. R. 12.

⁶ Lagonda N. Bank v. Portner, 46 O. S. 381.

⁷ Meech v. Stoner, 19 N. Y. 26. See Ward v. Ritt, 7 W. L. B. 76.

⁸ Cannon v. Cheney, 8 O. C. C. 143 (1894).

lie under the statutes relating to gaming against a third person who pays money lost at betting to the winner under the direction of the person losing it.¹

Sec. 634. What constitutes gaming.—The keeping of any bowling or nine-pin alley,² or any bets on election,³ or the selling of pools on an election, or upon the result of any trial or contest of skill, speed or power of endurance of man or beast,⁴ or the keeping or exhibiting of any gambling table (except billiards) for game or to win any money, or faro or keno bank, or any gambling device,⁵ or any contract to have or to give to himself or another any option to sell or buy at a future time any grain or other commodity,⁶ or the exhibition of a puppet show for money,⁷ are all branded as gambling transactions by statute. An agreement to sell a lot of hogs at a certain price, to be paid for upon the election of a certain person to office, is a wager within the meaning of the statutes and cannot be enforced.⁸ The statutes are considered in a broad sense, and are held to include within their meaning a bet upon the result of a game, sport, horse-race or dog-fight, or a wager staked upon an election or upon the future selling of bohemian oats at extravagant, fictitious prices assumed in advance, which acts are therefore void.⁹ Where there is no intention to deliver commodities, but only to deal and speculate in them by symbolical purchases and sales at market prices, such as futures or options, or where the transaction, though in proper form, is in fact fictitious under whatever form it may appear, the courts have stamped them gambling transactions and therefore void.¹⁰ The fact that one of the parties to such a transaction assumes to make the purchase or sell as a commission merchant merely, will not alter the relation, and the loser may recover from the winner.¹¹ And where it is the intention of the parties that property is not to be delivered, but that one party is to pay

¹ Roulstone v. Moore, 19 W. L. B. 387.

² R. S., sec. 7000.

³ R. S., sec. 6939a.

⁴ R. S., sec. 6939a.

⁵ R. S., sec. 6934.

⁶ R. S., sec. 6934a.

⁷ R. S., sec. 7005.

⁸ Lucas v. Harper, 24 O. S. 323.

⁹ Williams v. Keel, 17 W. L. B. 113.

¹⁰ Williams v. Keele, *supra*; Norton v. Blinn, 39 O. S. 145; Harper v. Crain, 36 O. S. 333. What are known as bohemian oats contracts are fraudulent, immoral and void. Carter v. Lilley, 3 O. C. C. 364; Widoe v. Webb, 20 O. S. 431.

¹¹ Lester v. Buel, 49 O. S. 240.

to the other the difference between the contract price and the market price at the time specified for executing the contract, the same is a gambling contract.¹ A contract to deliver property to another with the understanding that it will be a sale in the event of an election of a certain person is a wager, and may be rescinded before the election takes place.²

Sec. 635. Actions under gaming statutes.—In an action for the recovery of money or other valuable thing lost by playing at any game, or by the means of any bet or wager, the defendant may, upon the filing of an affidavit by the plaintiff stating the nature of the claim, that it is just, and the amount thereof, be arrested before judgment.³ It has long been provided by statute that a person who loses money or other thing of value, and has paid or delivered the same to the winner, may within six months after such loss recover the same in a civil action.⁴ Money deposited with a stakeholder may, when the bet is declared off by the parties, be recovered from him.⁵ Recovery may also be had for money expended in the purchase of any lottery or policy ticket or chance, or in or on account of any game of chance.⁶ The well-known rule that the law will leave parties to an illegal transaction where it finds them applies in all its force to gaming transactions,⁷ and will aid neither party to a gambling contract to enforce the same while it remains executory, in whole or in part; nor will it rescind the same when executed.⁸ While the law will not enforce an illegal contract, yet it will authorize the recovery of money received thereunder.⁹ One of the parties to a gaming contract cannot recover money upon a note given in pursuance thereof, nor can the other recover damages sustained by its breach.¹⁰ But there are cases where a note which has been executed in a gambling transaction will be

¹ Kahn v. Walton, 46 O. S. 195.

² Harper v. Crain, 86 O. S. 338.

³ R. S., secs. 5491-2.

⁴ R. S., sec. 4372; Hoss v. Layton, 3 O. S. 352; Veach v. Elliott, 1 O. S. 139.

⁵ Barnett v. Neill, W. 472. In such cases a demand and refusal is first necessary. Ward v. Ritt, 10 Am. Law Rec. 567; 7 W. L. B. 76, 123.

⁶ R. S., sec. 4271.

⁷ Norton v. Blinn, 39 O. S. 148; L. B. 22.

Kahn v. Walton, 46 O. S. 195; Shirley v. Ulsh, 2 O. C. C. 401.

⁸ Carter v. Lilley, 8 O. C. C. 364;

Widoe v. Webb, 20 O. S. 481. It will not set aside a deed executed upon the consideration of a bet upon the result of an election. Thomas v. Cronise, 16 O. 54.

⁹ Norton v. Blinn, 39 O. S. 145.

¹⁰ See Griffin v. Telegraph Co., 9 W.

valid, and enforced.¹ An action for the recovery of money or other property lost on a bet or wager is an action in the nature of a penalty or forfeiture, within the meaning of the code.²

Sec. 636. Same continued — The petition.— In stating a cause of action for the recovery of money lost at gaming, it will be sufficient for the plaintiff to allege that the defendant is indebted to plaintiff, or that he has received to the plaintiff's use the money so lost and paid, or converted the goods of the plaintiff to the defendant's use, whereby the action accrued to him, without setting forth the special matter.³ To recover property or money lost at gaming from one to whom it has been transferred, it is not necessary that demand be made therefor. But where the money comes into the hands of a person voluntarily, there can be no liability upon the part of such person to return it until demand has been made upon him for it.⁴ In an action for the recovery of money lost at gaming, an allegation that at the time the game was played and money lost by plaintiff the defendant was the owner of the building in which the game was played and the money lost, that he knowingly permitted the same for the purpose of gaming for money, and for the game with plaintiff, is, as against a general demurrer, a sufficient averment of the unlawful use and occupation of the building.⁵ It is sufficient to state the aggregate amount of loss, or the excess of loss over the winnings, between specified dates, without proving the amount and date of each particular loss, or the particular agent or proprietor to whom each sum was paid.⁶

Sec. 637. Petition for recovery of money lost at gaming.

Now comes the plaintiff, and for his cause of action says that the defendant is indebted to him in the sum of \$—— received to the plaintiff's use, won of plaintiff at gaming, and by him paid to defendant between the —— of —— and the —— of ——, 18——, whereby an action accrued to plaintiff under the statute against gaming, and for which plaintiff asks judgment with interest from ——.

NOTE— A demurrer was filed to this form which was sustained by the court of common pleas, but reversed by the circuit court of Cuyahoga county, which was affirmed by the supreme court in *Kelley v. Castle*, 27 W. L. B. 287, without report.

¹ *Stewart v. Simpson*, 2 O. C. C. 415;
R. S., sec. 4269.

² *Cooper v. Rowley*, 29 O. S. 547.

³ R. S., sec. 4272.

⁴ *Ward v. Ritt*, 7 W. L. B. 76.

⁵ *Binder v. Finkbone*, 25 O. S. 102.

⁶ *Lear v. McMillan*, 17 O. S. 464.

Sec. 638. Another form of petition for recovery of money lost at gaming.—

[*Caption.*]

The plaintiff above named says there is due to him from the defendants above named the sum of \$— with — per cent. interest thereon from —, 18—, for money lost by said plaintiff and paid to said defendants on said — day of —, 18—, at the city of —, county of — and state of Ohio, by playing a certain game of chance commonly called faro, the defendants then and there playing the said game with the plaintiff, and then and there winning the said sum from the plaintiff.

Wherefore plaintiff asks judgment against said defendants for said sum of \$—.

Sec. 639. Petition for the recovery of money lost on a wager.—

M. B. L., on the — day of —, 18—, at said county of —, was indebted, and still is indebted, to the said H. H., the plaintiff, in the sum of \$— for money, before that time and within six months before the commencement of this suit, to wit, on the — day of —, 18—, lost by the said plaintiff, and by him, the said plaintiff, paid to the said defendant, to wit, at the county aforesaid, upon a bet and wager then and there made by and between the said defendant and the said plaintiff, whereby an action hath accrued to the said plaintiff, according to the act against gaming, to demand and have from the said defendant the said sum of \$—. Yet the said defendant hath not paid the same nor any part thereof. And also for that, whereas, on the — day of —, 18—, at the said county of —, and within six months before the commencement of this suit, the said defendant received for the use of the said plaintiff one other sum of \$—, being money then and there bet and wagered by and between the said plaintiff and the said defendant, and afterward, to wit, on the day and year aforesaid, at the county aforesaid, lost by said plaintiff, and paid to and received by said defendant as the winner of such bet and wager, whereby an action hath accrued to said plaintiff, according to the form of an act entitled "An act," etc., passed —, to demand and have from the said defendant the said sum of \$—, yet the said defendant has not paid said sum of money nor any part thereof.

[*Prayer.*]

NOTE.— From *Hoss v. Layton*, 8 O. S. 52.

Sec. 640. Petition to enforce the lien of a judgment rendered under gaming statute.—

That at the — term of the court of common pleas of — county, Ohio, in a certain action wherein W. H. was plaintiff and F. R. and J. S. were defendants, the plaintiff duly recov-

ered a judgment against the said J. S. for the sum of — dollars.

That said action was brought by the plaintiff against said R. and S. under [*here state gaming statute*], for the recovery from the said R. and S. of certain money staked and betted by plaintiff with the said F. R. and J. S. on a certain game called faro, which said judgment in favor of said plaintiff and against said J. S. as aforesaid was for the amount found by said court to have been staked and betted by said plaintiff with said S. on said game and won by said S., and paid over to him by the plaintiff.

That said judgment is still in force, unreversed, and no part thereof has been paid.

That said game of faro, in which said sum of money was staked and betted and lost by plaintiff, was played on the — day of —, 18—, at and in a certain building owned by the said A. B., situate in the city of —, county of —, state of Ohio, of which the said A. B. was then and now is the owner, and is described as follows, to wit: [*Give description.*]

Plaintiff says that at the time said game was played and said money was staked and betted by said plaintiff on said game with said S., and lost by plaintiff and paid over to said S. as aforesaid, and for a long time before that, said A. B. knowingly permitted the room in said building in which said game was played to be used by said S. for the purpose of gaming for money, and for the purpose of said game of faro with plaintiff.

Plaintiff therefore prays the court to declare the judgment aforesaid a lien on said building and real estate, and for an order that said real estate and building may be sold for the satisfaction of the judgment, interest and costs of suit aforesaid, and for all proper relief.

NOTE.—From *Binder v. Finkbone*, 25 O. S. 102.

CHAPTER 41.

GUARANTY.

Sec. 641. Parties.

- 642. Rule as to alleging demand and notice.
- 643. Actions upon guaranty—Pleading.
- 644. Petition on guaranty bond for payment of money by agent.
- 645. Petition on guaranty to pay debt of third person on condition that time is extended to the latter.

Sec. 646. Petition on guaranty to pay the debt of another upon creditor agreeing to release lien.

647. Petition on guaranty for payment of rent.

648. Defenses to actions on guaranty.

649. Answer that guaranty was made upon condition that others should sign as principal.

650. Answer setting up want of diligence against principal.

Sec. 641. Parties.—Where a guaranty is written upon a contract at the time it is executed, the guarantor becomes an original contractor, and the parties may be sued jointly or severally.¹ A person who writes his name upon a note in transferring it, guarantying the payment at maturity, is a proper party to be sued jointly with the maker.² A subscriber to an institution of learning or other benevolent object, and a person guarantying payment thereof, may be joined in the same action upon the subscription.³ The guarantor and the principal debtor are not joint promisors.⁴ A contract of guaranty being assignable, an assignee thereof may bring suit upon it.⁵ It is held that where a stranger writes a guaranty

¹ Leonard v. Sweetzer, 16 O. 1; Gale v. Van Arman, 18 O. 336; Marvin v. Adamson, 11 Ia. 371; Tucker v. Shiner, 24 Ia. 884; Hendricks v. Fuller, 7 Kan. 381. *Contra*, Allen v. Fosgate, 11 How. Pr. 218; Graham v. Ringo, 67 Mo. 324; Central Savings Bank v. Shine, 48 Mo. 463.

² Kautzman v. ~~Switzer~~, 16 O. S. 330. See Stone v. ~~Switzer~~, 16 O. S. 625.

³ Neil v. Board of Trustees, 15 O. S. 15.

⁴ Deming v. Board of Trustees, 31 O. S. 41.

⁵ Small v. Sloan, 1 Bosworth, 352.

upon a note he may be sued jointly with the maker.¹ Under the Ohio code it is held that a guarantor cannot be joined in an action with an original contractor; yet if the instrument be in the form of the original contract of one of the defendants, and the guaranty of the other, and were executed upon the same consideration, and at the same time, taking effect at the same time, they will then be regarded as original contractors and may be sued jointly.²

Sec. 642. Rule as to alleging demand and notice.—Where the guaranty is conditional the guarantor cannot be charged unless payment is demanded of the maker when due, and notice of the non-payment given to the guarantee.³ But where it is absolute and unconditional, no averment of demand and notice need be made in the petition;⁴ nor is it necessary to give notice of the default to charge an absolute guarantor of an existing demand, if the guaranty is made subsequent to such default.⁵ Nor is it necessary that demand be made upon and notice given the makers of a note at maturity, to charge the payee, who has made a special guaranty of its collectibility, by due course of law; a failure in this respect will not discharge the guarantor.⁶ A guaranty that a note shall be paid, which is made upon consideration that the payee delay the payment thereof, is an original agreement, and it is not necessary that demand and notice be made upon the guarantor.⁷ But demand and notice are requisite to charge a guarantor where the fact of his liability rests within the knowledge of the guarantee, or is dependent upon his option.⁸ It is also necessary that the guarantee give notice of his acceptance and intention to act under it, where the instrument

¹ *Gale v. Van Arman*, 18 O. S. 336. be given at once to the guarantor.

² *Lamping v. Cole*, 5 W. L. M. 187; *Taylor v. Wetmore*, 10 O. 490. A demand must be made upon a person not a party to a note who writes a guaranty thereon. *Parker v. Riddle*, 11 O. 103.

³ *Greene v. Dodge*, 2 O. 498.

⁴ *Clay v. Edgerton*, 19 O. S. 549; *Wise v. Miller*, 45 O. S. 338; *Powers v. Bumcratz*, 12 O. S. 278; *Bashford v. Shaw*, 4 O. S. 266; *Brown v. Curtiss*, 2 Comst. 225; *Breed v. Hillhouse*, 7 Conn. 523. Where a bill of goods is taken upon the faith of a letter of credit, notice thereof must

⁵ *Bonebrake v. King*, 49 Kan. 296; 31 Pac. Rep. 1007.

⁶ *Forest v. Stewart*, 14 O. S. 246. See *Kyle v. Green*, 14 O. 490.

⁷ *Reed v. Evans*, 17 O. 128.

⁸ *Bashford v. Shaw*, 4 O. S. 268.

is in legal effect an offer or proposal.¹ A defense as to delay of notice, that the note guarantied could not be collected, may be made to show that the guarantor was injured thereby.²

Sec. 643. Actions upon guaranty — Pleading.— It is the well-established rule of construction that the guarantor is bound only by the strict terms of his contract, and that the same is liberally construed in his favor.³ Even though a consideration be shown by the writing constituting the guaranty, it is nevertheless necessary that the petition should aver that it was supported by a consideration.⁴ If a guaranty be made as to the collectibility of a note by the ordinary process of law, it is usually necessary to prosecute the maker to judgment. This, however, is not so when the latter is insolvent.⁵ The liability of a guarantor is fixed when the maker of the note is insolvent at maturity.⁶ A guarantor who guaranties that a debt will be paid when it becomes due will not be liable if the creditor fails to prosecute the principal with due diligence.⁷ The expression, "We know them to be good," constitutes a guaranty that a note is good and collectible at maturity, upon which a recovery may be had.⁸ Permission to use a person's name as guaranty up to a certain sum is not in fact a guaranty, but confers power to sign the name of such person to the note for money borrowed.⁹ An owner of a mortgaged debt who assigns the same to another, guarantying payment, is released from his guaranty by a contract between the assignee and the mortgagor extending the time of payment.¹⁰ A personal action cannot be maintained by an assignee of a note and mortgage upon a guaranty of the assignor as to the collectibility of the note, made contemporaneously with the assignment, without resorting to the mortgage security.¹¹ In an action upon a contract of guaranty made as to the payment of money, the petition should aver that the defendant has not paid the indebtedness for the re-

¹ *Wise v. Miller*, 45 O. S. 388.

² *Wolf v. Brown*, 5 O. S. 304.

³ *Morgan v. Boyer*, 39 O. S. 324.

⁴ *Greene v. Dodge*, 2 O. 498. As to consideration, see *Easter v. White*, 12 O. S. 219; *Kelsey v. Hibbs*, 13 O. S. 840.

⁵ *Stone v. Rockefeller*, 29 O. S. 625.

⁶ *Id.*

⁷ *Craig v. Parkis*, 40 N. Y. 181.

⁸ *Bank v. Bank*, 45 O. S. 236.

⁹ *Palmer v. Yarrington*, 1 O. S. 253.

¹⁰ *Fithian v. Corwin*, 17 O. S. 118.

¹¹ *Timmerman v. Howell*, 2 O. C. C. 27.

covery of which the suit is brought, an allegation that the whole amount is not due not being sufficient.¹ It is considered unnecessary in an action upon a contract required by the statutes of fraud to be in writing, such as a guaranty, to allege in the petition that it is in writing. This is matter of defence.* Where the guaranty is a conditional one, the plaintiff should allege and prove that the condition has happened which creates the liability.² A statement of a cashier of a bank, made with reference to a bill, that it is perfectly safe, amounts to a guaranty upon which an action will lie.⁴ The principle that delay in enforcing payment does not release a guarantor, except to the extent that he is injured thereby, does not apply where the delay is due to an extension of time without his consent.⁵

Sec. 644. Petition on guaranty bond for payment of money by agent.—

The plaintiff says it is a corporation duly incorporated under the laws of Ohio, and that on — —, 18—, the defendant, C. H. (for a good and sufficient consideration, to wit, to enable C. D. and W. S. S. to obtain [*goods to be sold*] in car-load lots on credit from the plaintiff), executed and delivered to plaintiff her certain written obligation, and thereby bound herself, her heirs, executors and administrators, to pay plaintiff the sum of — dollars.

The condition of said obligation was, that if the said C. D. and W. S. S., as agents for the sale of [*goods to be sold*] for the plaintiff, should pay all money that may be owing the plaintiff as purchase-money for all [*specify goods*] they may purchase while acting as agents for the plaintiff, then the above obligation was to be void. Otherwise the same was to remain in full force. (A copy of said bond of guaranty is filed herewith as an exhibit.)

The plaintiff avers that the said C. D. and W. S. S., as agents for the sale of [*specify goods sold*] for the said company, did not pay the plaintiff for all [*specify goods*] they purchased while acting as agents for plaintiff. But plaintiff avers that the said S. and D. now owe the plaintiff for the goods so purchased by them a sum greatly in excess of — dollars,

¹ Roberts v. Treadwell, 50 Cal. 520. 583; McCulluch v. Tapp, 4 W. L. M.

² Marston v. Sweet, 66 N. Y. 206; 575.

McDonald v. Homestead Assoc., 51 Cal. 210; Taylor v. Patterson, 5 Ore. 235.

³ Cereghino v. Hammer, 60 Cal.

121; Walsh v. Kattenburgh, 8 Minn.

127; Ecker v. McAllister, 45 Md.

290; Mullaly v. Holden, 123 Mass.

⁴ Sturges v. Bank, 11 O. S. 153.

⁵ Jones v. Turner, 6 W. L. B. 231.

and the said S. and D. and the defendant C. H. all refuse and neglect, upon demand, to pay the same, or any part thereof.

Wherefore the plaintiff prays judgment against the said C. H. for the sum of — dollars, with interest from —, 18—.

NOTE.—From *Hess v. Brewing Company*, error to circuit court of Belmont county, Ohio, Supreme Court, unreported case, No. 1624. Sureties and guarantors are never held responsible beyond the clear and absolute terms and meaning of their undertaking. *Morgan v. Boyer*, 39 O. S. 324; *Donley v. Bank*, 40 O. S. 47 and 51; *Brandt on Suretyship*, sec. 79. A guarantor is bound only by the precise words of his contract, and other words cannot be added by construction or implication. *Morgan v. Boyer*, 39 O. S. 326.

Demand and notice is not necessary where the sureties guaranty that their principal shall sell and account for all goods placed in his hands within a stated period. *Bush v. Critchfield*, 4 O. 103.

Sec. 645. Petition on guaranty to pay debt of third person on condition that time is extended to the latter.—

On the — day of —, 18—, one E. F. was indebted to plaintiff in the sum of \$—, which sum was then due and payable; that on said day defendant requested plaintiff to extend the time of payment of said debt until the — day of —, 18—. In consideration of said extension of time for said payment by plaintiff, said defendant promised plaintiff in writing that he would pay said sum in case said — did not pay the same on or before the — day of —, 18—; a copy of which contract is attached as an exhibit.

That plaintiff, relying upon said promise of the defendant, did extend the time for the payment of said sum to said E. F., until the — day of —, 18—, which time has since elapsed, but said E. F. has not paid said sum nor any part thereof, of all which the defendant was duly notified on the — day of —, 18—, yet said defendant has not paid said sum nor any part thereof. Plaintiff therefore asks judgment against the defendant for the sum of \$—.

NOTE.—The contract of guaranty becomes an evidence of indebtedness. See *ante*, sec. 57. *Demand* and notice is not required in all classes of guaranties, as where it is a guaranty undertaken originally with the principal, or an absolute and independent stipulation. *Bashford v. Shaw*, 4 O. S. 263; *McKensie v. Farrell*, 4 Bosw. 192; *Dearborn v. Sawyer*, 59 N. H. 95; *Allen v. Rightmere*, 20 Johns. 365; 17 O. 128. It is necessary, however, where the agreement is to pay if the principal does not (*Greene v. Dodge*, 2 O. 430); and also where the facts on which the liability depends are peculiarly within the knowledge of the guarantee. *Bashford v. Shaw*, *supra*. There must be actual damage resulting therefrom. *Bashford v. Shaw*, 4 O. S. 263.

Sec. 646. Petition on guaranty to pay the debt of another upon creditor agreeing to release lien.—

That on the — day of —, 18—, one C. D. was indebted to plaintiff in the sum of \$—, which was secured by a lien upon certain goods of C. D., then in the possession of this plaintiff.

That on said day the defendant requested plaintiff to surrender said goods to C. D. and release his said lien thereon, and in consideration of said release of said lien by plaintiff, defendant agreed in writing to pay plaintiff the amount of said debt on the — day of —, 18—, in case the said C. D. did not pay the same. A copy of which contract is attached as an exhibit.

That in consideration of said promise of defendant the plaintiff then and there gave up possession of said goods to said C. D., and abandoned his lien thereon.

That no part of said debt has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$—.

NOTE.—As to attaching contract, see *ante*, sec. 57.

Sec. 647. Petition on guaranty for payment of rent.—

That on the — day of —, 18—, one A. B. leased from the plaintiff the following described premises, viz.: [*describe premises*], at a yearly rent of \$—, payable [*designate time*], beginning on the — day —, 18—, and ending on the — day of —, 18—.

That at the time of making said lease the defendant, C. D., in consideration of leasing said premises to said A. B., and as security for the payment of the rent thereof, made and delivered to plaintiff an agreement in writing, by which agreement he guarantied that the said A. B. would punctually pay said rental for said premises as the same became due (a copy of which guaranty is filed herewith as an exhibit). (*Ante*, sec. 57.)

That said A. B. entered into possession of said premises under said lease on the — day of —, 18—, and occupied the same until the — day of —, 18—.

That the said A. B. has failed to pay the rent due thereon from the — day of —, 18—, to the — day of —, 18—, amounting to the sum of \$—, and on the — day of —, 18—, the plaintiff demanded payment thereof from him, but he did not pay the same, of which the defendant was then duly notified.

That no part thereof has been paid, and there is now due from the defendant to the plaintiff on said guaranty of the defendant C. D. the sum of \$—, for which he asks judgment.

Sec. 648. Defenses to actions on guaranty.—In an action upon a guaranty for payment of materials for another, a general denial of payment will be sufficient without other allegations.¹ Where a defense to an action is founded on an

¹ *McShane Co. v. Padian*, 20 N. Y. S. 679.

agreement falling within the statute of frauds, the answer should aver that the same was in writing.¹

Sec. 649. Answer that guaranty was made upon condition that others should sign as principals.—

Defendant says that he executed the contract of guaranty by indorsing and signing the same on the bond mentioned in the petition.

That said bond as then written had the names of R. F. and V. O. inserted therein as principals; but said V. O. had not yet signed the same.

That this defendant signed said guaranty at the instance and request of said R. F., and on the express agreement and condition with said R. F. that the same should not be binding on this defendant, or delivered to the plaintiff, until said bond was signed by said V. O. as one of the principals.

That said V. O. never signed said bond; and said R. F., in violation of said agreement, and without this defendant's knowledge or consent, delivered the same with said guaranty to the plaintiff [who accepted and received the same with full knowledge of the agreement and the condition on which this defendant signed said guaranty.]

Sec. 650. Answer setting up want of diligence against principal.—

That the plaintiff did not, at the maturity of the claim sued on, or at any other time [*or, until the — day of —, 18—*], notify defendant that R. F. [*the principal debtor*] had not paid the same, nor had defendant any knowledge of his default in payment.

That at the time said claim fell due, and for — months thereafter, said R. F. was the owner of — dollars' worth of real and personal property, situated in the county of —, state of Ohio, subject to execution, out of which said debt could have been made; but the plaintiff did not commence an action against said R. F. therefor, nor take any steps to collect the same from him [*until —, 18—*].

That in the meantime said R. F. became and still is wholly insolvent, and if this defendant is compelled to pay the said bond he will lose the same; whereas if plaintiff had used due diligence in notifying this defendant of the default of said R. F., or in collecting the amount of said bond, this defendant would not have been compelled to pay or lose the same.

Wherefore this defendant says that by reason of the negligence and want of diligence of the plaintiff he has been damaged in an amount equal to the plaintiff's claim, and he demands judgment therefor.

¹ Reinheimer v. Carter, 31 O. S. 572.

CHAPTER 42.

HABEAS CORPUS.

Sec. 651. Who entitled to writ, and questions raised thereon.	Sec. 656. Petition by parent for possession of his child.
652. The petition or application.	657. Petition by father to regain custody of minor son in United States army.
653. Form of petition for <i>habeas corpus</i> — Setting forth facts.	658. Who may grant the writ.
654. Petition where applicant is imprisoned by an officer — A common form.	659. The writ — Code provisions.
655. The use of the writ in determining the custody of minors.	660. Return or answer.
	661. Form of return or answer.

Sec. 651. Who entitled to writ, and questions raised thereon.— It is said that the right of trial by jury and the writ of *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.¹ Yet the extent of the jurisdiction in *habeas corpus*, as well as the manner of its exercise, is undoubtedly in a large measure within legislative control, and must therefore be determined in the light of the constitution and statutes.² A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of *habeas corpus* to inquire into the cause of such imprisonment, restraint or deprivation.³ While the writ is a sacred one in the light of the constitution, yet there are many questions which cannot be raised by resorting to it. The proceedings before a judge *de facto* cannot be questioned in a collateral proceeding in *habeas corpus*, any more than if he were a judge *de jure*.⁴ Neither can a wrongful sentence, unless absolutely void, be reviewed or reversed in *habeas corpus* proceedings, but the injured party must proceed

¹ Work v. State, 2 O. S. 296, 302.

² Knapp v. Thomas, 39 O. S. 384

³ O. Code, sec. 5726.

⁴ Ex parte Strang, 21 O. S. 610-15

by petition in error.¹ And in all cases where relief is sought by persons sentenced for crime, the question of jurisdiction of the court pronouncing the same determines the right to apply for a writ of *habeas corpus*; and whenever it appears that they were sentenced by a court of competent jurisdiction, the same cannot be reviewed in *habeas corpus* proceedings, but the remedy in error must be pursued.² Nor can mere irregularities in the sentence of a court of competent jurisdiction be reviewed in *habeas corpus*.³ Although the writ may be used to inquire into a question of the jurisdiction of a court over a particular offense, yet a court having jurisdiction in *habeas corpus*, but not over the crime, should not allow the writ and discharge the defendant.⁴ A person cannot resort to *habeas corpus* proceedings in a national court on the ground that a state court forced him to trial without time for preparation, or any opportunity to secure compulsory process or the presence of material witnesses;⁵ nor can the writ be used for the purpose of collaterally inquiring into the title of an officer;⁶ nor can a question as to excessive punishment be determined in *habeas corpus*, as it would be turning it into a remedy for the correction of errors;⁷ nor of former jeopardy, when the legality of the proceedings under which the prisoner is restrained is not called in question;⁸ nor is it the proper remedy to try an issue of *autrefois acquit*.⁹

National courts cannot exercise appellate jurisdiction over the proceedings of trial courts or courts of a state, nor review their conclusions of law and findings of facts and pronounce them erroneous. They may in their discretion put the petitioner to his writ of error in the highest court of the state, or summarily determine whether the party is restrained of his

¹ Ex parte McGehan, 22 O. S. 442.

⁵ In re McKnight, 80 W. L. B. 118

² Ex parte Van Hagan, 25 O. S. 426;

(U. S. C. C., 1898).

Ex parte Wagener, 1 Disn. 10, 14;

⁶ Miles v. Westcott, 28 W. L. B. 36;

Madden v. Smeltz, 2 O. C. C. 168.

15 N. J. L. J. 175. A *de facto* officer,

³ Ex parte Shaw, 7 O. S. 81; State

Ex parte Strang, 21 O. S. 610.

v. McClay, 54 N. W. Rep. 524 (Neb., 1893).

⁷ In re MacDonald, 33 Pac. Rep. 18 (Wyo., 1898).

⁴ Ex parte Wagener, 1 Disn. 10;

⁸ Steiner v. Nerton, 32 Pac. Rep.

Hatch v. St. Clair, 2 O. C. C. 163;

1063 (Wash., 1898).

Butterfield v. O'Connor, 2 W. L. G.

⁹ Pitner v. State, 44 Tex. 578; State

185; Ex parte McGehan, 22 O. S. 442.

v. Klock, 12 So. Rep. 307 (La., 1898).

liberty in violation of the constitution of the United States. But they should not entertain jurisdiction where the questions raised are precisely the same as those raised in a state court of last resort.¹ This seems the better rule even though constitutional questions under the United States constitution were raised in both courts; otherwise a dangerous conflict would arise between a state court of last resort and an inferior federal court, and the proceeding could be used by the latter court to collaterally impeach the state court, when error from the state court would seem to be the appropriate remedy. The illegality of a second sentence cannot be inquired into while the person is held under a valid sentence and commitment.² As a probate judge has no authority to imprison a person who refuses to deliver property to a receiver appointed by him, as for contempt, one so imprisoned may be released by *habeas corpus* proceedings.³ While the writ cannot be used to review and correct errors of courts acting within their powers, it is the proper remedy to release one from imprisonment under a process made by a court without jurisdiction.⁴ It is said that courts have jurisdiction to hear and determine all questions of imprisonment without regard to the power which imposes it, or the process by which the prisoner is held.⁵ The detention of an inmate by the trustees of a reform school may be inquired into by *habeas corpus*.⁶ A person surrendered by another state upon extradition proceedings, who has been arrested while held in custody there under for a crime other than for which he was extradited, may be released by *habeas corpus*, as he must be given a reasonable time to leave the state.⁷ Employees of a corporation who have been arrested for contempt in violating an order against a corporation may be released on *habeas corpus*.⁸

¹ In re King, 51 Fed. Rep. 434; Ex parte Royall, 117 U. S. 241; In re Duncan, 139 U. S. 449; In re Wood, 140 U. S. 289.

² Ex parte Ryan, 17 Nev. 139; 28 Pac. Rep. 1040 (1892).

³ White v. Gates, 43 O. S. 109.

⁴ Ex parte McKnight, 48 O. S. 588; State v. Hamilton, 3 O. C. C. 10.

Evidence may be introduced to prove

want of jurisdiction of court. In re George, 5 O. C. C. 207.

⁵ In re Collier, 6 O. S. 55.

⁶ In re Kruse, 2 C. S. C. R. 71;

Prescott v. State, 19 O. S. 184.

⁷ Ex parte McKnight, 48 O. S. 588;

State v. Vanderpool, 39 O. S. 273; United States v. Rauscher, 119 U. S. 407.

⁸ In re George, 5 O. C. C. 207.

The writ being in the nature of a collateral attack upon a judgment, the inquiry must be limited to the question of jurisdiction of the court.¹ A person claiming that he is restrained under a sentence of imprisonment pronounced under an unconstitutional statute may resort to *habeas corpus* proceedings to test the constitutionality of the law.² A prisoner confined under an invalid municipal ordinance which is an absolute nullity may be released by *habeas corpus*.³ Where an officer refuses to bring a person before a commissioner of insolvents he should pursue the remedy of *mandamus* rather than *habeas corpus*.⁴ An unconditional pardon which has been delivered cannot be impeached in *habeas corpus* proceedings for the purpose of showing that the same was procured by fraud.⁵

Sec. 652. The petition or application.—Although a *habeas corpus* proceeding is of a different nature from other actions, it is generally treated as a civil action.⁶ The pleadings are virtually the same as in other actions. The application must be made by petition, duly signed and verified by the party seeking relief, or by some person for him. It must state that the person in whose behalf the application is made is imprisoned or restrained of his liberty, and the officer or name of the person by whom he is confined or restrained; or, if both are unknown or uncertain, he may be described by an assumed appellation; and the person who is served with the writ is to be deemed the person intended. The place where the person is so imprisoned or restrained, if known, must be stated, and a copy of the commitment or cause of detention must be exhibited if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without any legal authority, that fact should appear.⁷ A demurrer may be filed to the petition or to the return or answer, and issues of law or fact raised by the pleadings are determined as in other cases.⁸ A hearing will not be defeated by

¹ *In re King*, 51 Fed. Rep. 434.

⁶ *Ammon v. Johnson*, 3 O. C. C.

² *In re Kline*, 6 O. C. C. 215; Ex 263.

parte Siebold, 100 U. S. 176.

⁷ O. Code, sec. 5728.

³ *Ex parte Clamp*, 16 W. L. B. 229.

⁸ *Ammon v. Johnson*, 3 O. C. C.

⁴ *Ex parte Scott*, 19 O. S. 581.

263.

⁵ *Knapp v. Thomas*, 39 O. S. 377.

the failure of the officer to find the body of the person who is sought.¹ It has been suggested in an intermediate report that, where the custody is not controverted, the application or petition may merely declare in the language of the statute that a person is unlawfully restrained of his liberty, or is illegally restrained and without legal authority, by a certain person named;² and although the statute provides that the petition shall state that the person in whose behalf the application is made is restrained of his liberty, it is essential that all the facts constituting the illegal restraint should be fully set forth. It is not sufficient to merely aver that the petitioner is illegally restrained of his liberty, as that is a legal conclusion. It must clearly appear in what the illegal restraint consists. The facts constituting the unlawful restraint should be plainly and concisely set forth in accordance with the rules for stating a civil action.³ The petition should also state the place of confinement.⁴

Sec. 653. Form of petition for habeas corpus — Setting forth facts.—

Your petitioner, C. D., respectfully states that on the — day of —, 18—, he was arrested by A. B., who is sheriff of the county of — and state of Ohio, upon a certain warrant of arrest issued to said A. B. by the clerk of the — court of — county, Ohio, in an action wherein the said E. F. was plaintiff and your petitioner was defendant; that by virtue of said order of arrest your petitioner is now restrained of his liberty and is imprisoned in the — county jail by said sheriff.

That the pretended cause of restraint and imprisonment is

¹ *Ammon v. Johnson*, 8 O. C. C. 263.

² *In re Curd*, 11 W. L. B. 166. See *Ex parte Champion*, 52 Ala. 311.

³ *State v. Ensign*, 18 Neb. 250; *Ex parte Nye*, 8 Kan. 99. See, also, *In re Snyder*, 17 Kan. 542; *In re Clepper*, 26 Ill. 532. Volume 9 of the Am. and Eng. Encyclopedia of Law, page 178, in treating of a petition in *habeas corpus*, states that: "The application for a writ of *habeas corpus* should put before the court or judge facts enough to permit an intelligent judgment to be formed of the case. The rules of good pleading should be

followed. Conclusions of law should be avoided. The petition should show in what the illegality of the imprisonment consists, and this should be done by stating the facts showing it." Page 179: "A petition for the transfer of children, being addressed to the sound discretion of the court, must contain a full disclosure of all the essential facts before a writ of *habeas corpus* will be granted upon it."

⁴ *People v. Rosenthal*, 59 How. Fr. 287.

no other than that above given, a copy of which warrant is exhibited herewith.

That the allegations set forth in the affidavit of said A. B., upon which said order of arrest was issued, are untrue, in this: that the petitioner, at the time said affidavit was filed and said order of arrest issued, was not about to leave this state, nor has he been at any time since then, nor is he now, about to leave this state, taking with him property subject to execution, or money or effects which should have been or should now be applied to the payment of said E. F.'s claim, with intent to defraud said E. F.

Wherefore your petitioner asks that a writ of *habeas corpus* may be granted, and that he may be discharged from such unlawful restraint and imprisonment.

[*Verification as in ordinary cases.*]

Sec. 654. Petition where applicant is imprisoned by an officer—A common form.—

Your petitioner, J. F. S., respectfully represents that he is unlawfully restrained of his liberty by J. E. M., chief of police of the city of C., Ohio, at the city prison. The pretended cause of the imprisonment is as follows, and shown by copy of the commitment hereto attached, marked "Exhibit A."

Wherefore your petitioner asks that a writ of *habeas corpus* may be granted and he may be discharged from such unlawful imprisonment.

NOTE.—This form is taken from *In re Sipe*, an unreported case in the supreme court, and is an exact copy of form in 1 Bates' Pldg., p. 466, and in Maxwell's Code Pldg., p. 672. It is inserted here because of the fact that it has been commonly used, and is the form used by the authors mentioned as well as by practitioners following the same, and is therefore entitled to consideration, as well as for the purpose of making a comparison and more fully illustrating the rules stated in *ante*, section 652, which are believed to be correct. The writer, however, does not believe it to be a correct form, for reasons stated in a preceding section, 652. It is subject to a motion to make definite and certain by setting forth the facts constituting the unlawful imprisonment or restraint, and because it is the statement of a mere legal conclusion, according to the authorities cited in *ante*, section 652. This view has been taken by a trial court upon a motion of this character in the case of *In re Barnes*, 80 W. L. B. 164. The proper form is the one in section 653. See sec. 655, *post*.

Sec. 655. The use of the writ in determining custody of minors.—The writ of *habeas corpus* is the proper remedy for the ascertainment and enforcement of the legal or proper custody of an infant, and is of an equitable nature, being almost entirely discretionary with the court.¹ And in a case brought by the mother against the father for the custody of an infant, other things being equal, it will be awarded to the mother.²

¹ *Green v. Campbell*, 85 W. Va. 693; ² *State ex rel. v. Niles*, 25 W. L. B. 327.
N. C., 14 S. E. Rep. 212.

A writ will not only be granted when the place of the detention is within the jurisdiction, but its effect cannot be avoided by the removal of a party detained.¹ Where the custody of a minor has been awarded to one of the parents in a divorce proceeding, no inferior court can legally interfere by *habeas corpus* with the custody so decreed.² The jurisdiction of the trial court in such a case is a continuing one, and it may modify any decree made with respect to the custody of a minor as changed conditions may demand.³ A person who has been awarded the custody of a minor child by a decree of one state cannot go into another state and recover the custody of such child in reliance upon the judgment of the sister state, when the conditions have so far changed that the best interests of the minor require that the judgment of the sister state should be disregarded. It is the duty of the court to take testimony and determine the question anew, when the pleadings show a changed condition of affairs.⁴ A second application for a writ of *habeas corpus* for the custody of a minor child cannot be made when the controversy relates to the same matter and is upon the same state of facts. Under such circumstances the doctrine of *res adjudicata* is applicable, as in other cases.⁵ On the other hand, the doctrine of *res adjudicata* cannot be applied when the facts and circumstances have so far changed that the best interest of the minor demands that a different order be made;⁶ and under the clause of the constitution providing that full faith and credit shall be given in each state to the judicial proceedings of every other

¹ *Ex parte Everts*, 2 Disn. 83.

² *Hoffman v. Hoffman*, 15 O. S. 427.

³ *Rogers v. Rogers*, 31 W. L. B. 67; 51 O. S. 1; *Hoffman v. Hoffman*, *supra*.

⁴ *In re Barnes*, 30 W. L. B. 164. See *Cunningham v. Barnes* (W. Va.), 17 S. E. Rep. 308. The best interest of the child is always the criterion, notwithstanding a judgment or decree has been made in another state. *Freeman on Judgments*, sec. 324; *In re Bort*, 25 Kan. 308; *Thorndyke v. Rice*, 24 Law Reporter, 19 (Mass., 1860); *People v. Allen*, 105 N. Y. 628.

⁵ *State v. Bechdel*, 37 Minn. 360;

Mercien v. People, 25 Wend. 64; s. c., 35 Am. Dec. 658; *People v. Brady*, 64 N. Y. 182; *Church on Habeas Corpus*, sec. 337; *Freeman on Judgments*, sec. 324; *Brooke v. Dogan*, 112 Ind. 183; *Dubois v. Johnson*, 96 Ind. 6.

⁶ *Hurd on Habeas Corpus*, pp. 462, 516; *In re Bort*, 25 Kan. 308; *Thorndyke v. Rice*, 24 Law Reporter, 19 (Sup. Ct. Mass. 1860, Bigelow, J.); *In re Barnes*, 30 W. L. B. 164.

state, the same doctrine of *res adjudicata* will be applied to a decree of a sister state as to the custody of a minor with respect to the same subject-matter and the same facts. But whenever this doctrine is sought to be applied in the case of a domestic or foreign decree, although it may be binding between the parties, it will not preclude the court from considering the best interest of the child; and hence it will hear the evidence and make such order as the interest of the minor seems to require.¹

Sec. 656. Petition by parent for possession of child.—

Your petitioner respectfully represents that A. B. is his minor child of the age of — years, to whose possession he is lawfully entitled. That C. D. has seized the body of said child and now restrains him of his liberty and deprives your petitioner of the possession of him by forcibly confining him in his, the said C. D.'s, dwelling-house, situated on the — street in the city of —, county of —, state of Ohio. That said restraint is wholly unlawful and without right in this, to wit: [*Here state facts necessary to disclose the unlawful restraint.*]

Wherefore your petitioner prays for a writ of *habeas corpus*, and that the said minor child be ordered delivered up to him.

NOTE.— See *ante*, sec. 653.

Sec. 657. Petition by father to regain custody of minor son in United States army.—

Your petitioner respectfully represents that he is a resident of the town of W., in the county of N. and state of —; that he has a minor son of the age of — years, named J. M., who enlisted in the military service of the United States on or about the — day of —, 18—, for the term of — years, by — —, having his office in the place of enlistment at —, in the county of S. and state aforesaid, without the knowledge or consent of your petitioner, without whose consent he avers and believes said enlistment was and is void; and your petitioner further represents that his said minor son is deprived and restrained of his liberty at —, by the said — —, or by officers or persons under his charge and direction; that your petitioner has represented to the said — — that the said J. M. is a minor and that your petitioner refuses to give his consent to the enlistment; but

¹ In *re Barnes*, 31 W. L. B. 164; In any case will consider the choice of
re Bort, 25 Kan. 308; *Thorndyke v.* the child. *Clark v. Boyer*, 32 O. S.
Rice, 24 Law Reporter, 19; *People v.* 299.
Allen, 105 N. Y. 628. The court in

that the said — — refuses to release the said J. M. and is about sending him out of the jurisdiction of this court for the purpose of compelling him to perform military services.

Wherefore your petitioner respectfully prays the court to grant a writ of *habeas corpus* to be directed to — —, having charge of the said J. M., commanding him and them to bring the said J. M. before this court to do, submit to and receive what the laws may require.

NOTE.—The father may inquire into the illegality of the detention of his minor son by *habeas corpus*. *McConologue's Case*, 107 Mass. 154. See *State v. Bready*, 2 Southard, 555.

Sec. 658. Who may grant the writ.—The writ may be granted by the supreme court, circuit court, common pleas court, probate court, or by a judge of either.¹ In view of the light in which the constitution regards the writ, and of the fact that the statutes have conferred original jurisdiction in *habeas corpus* upon all courts of record, it would seem that it ought to be regarded as a matter of right to have the writ issued in any court. Yet the supreme court early adopted the rule that it was within its discretion whether or not it would put aside its regular business and entertain applications for the writ, unless it be in very urgent cases, or under peculiar circumstances,² or when it seemed necessary to settle some important question.³

Sec. 659. The writ — Code provisions.—The writ should not be issued if it appears from the application that the person is under restraint by virtue of a judgment having jurisdiction.⁴ The clerk shall issue the writ forthwith, or in case of emergency the judge may issue it himself and depute any officer or person to serve it.⁵ If the person be detained by imprisonment by an officer, the writ should be directed to him, commanding him to have the body before the court at the time and place therein named.⁶ In case of confinement, imprisonment or detention by a person not an officer, the writ shall be in the form following:

THE STATE OF OHIO, }
— County. } ss.

To the Sheriffs of our several counties, Greeting:

We command you that the body of — —, of — —, by

¹ O. Code, sec. 5727.

² Ex parte Shaw, 7 O. S. 81.

³ Ex parte Shean, 25 O. S. 440.

⁴ O. Code, sec. 5730.

⁵ O. Code, sec. 5731.

⁶ O. Code, sec. 5733.

— —, of —, imprisoned and restrained of his liberty, as it is said, you take and have before — —, a judge of our — court, or, in case of his absence or disability, before some other judge of the same court, at —, forthwith to do and receive what our said judge shall then and there consider — concerning him in his behalf; and summon the said — — then and there to appear before our said judge, to show the cause of the taking and detention of said — —.

Witness, — at —, this — day of —, in the year —.

The officer must make a due return of the writ, together with the cause of the caption and detention of the person, according to the command thereof.¹ When the writ is issued by a court in session, if the court is adjourned when the same is returned, it may come before any judge of the same court.² A court having obtained jurisdiction of a child in one county in adverse proceedings involving the custody of a child may send its process in any county in the state in which such child has been taken.³ The writ may be served in any county by the sheriff of the same or any other county or by a person appointed.⁴

Sec. 660. The return or answer.—The defendant is required to make what is styled a return, which is in fact treated as an answer.⁵ When the person to be produced is imprisoned or restrained by an officer, the person who makes the return shall state therein, and in other cases the person in whose custody the prisoner is found shall state, in writing, to the court or judge before whom the writ is returnable, plainly and unequivocally: 1. Whether he has or has not the party in his custody or power, or under restraint. 2. If he has the party in his custody or power, or under restraint, he shall set forth at large the authority and the true and whole cause of such imprisonment and restraint, with a copy of the writ, warrant or other process, if any, upon which the party is detained. 3. If he has had the party in his custody or power or under restraint, and has transferred such custody or restraint to another, he shall state particularly to whom, at what time, for what cause and by what authority such transfer was made.⁶

¹ O. Code, sec. 5736.

² O. Code, sec. 5737.

³ In re Talbott, 9 W. L. B. 271.

⁴ O. Code, sec. 5735.

⁵ Ammon v. Johnson, 3 O. C. C.

268; Knapp v. Thomas, 39 O. S. 378;

Church's Habeas Corpus, sec. 120;

Hurd on Habeas Corpus (2d ed.), 235.

⁶ O. Code, sec. 5738.

The return or answer should be signed by the officer and sworn to unless he is a public officer and makes the return in his official capacity.¹ It has been said in New York that the better opinion is that a return to a writ of *habeas corpus* could not be controverted. But upon the return, which is really an answer, the petitioner is allowed to deny material facts set forth in the writ, and make new allegations in support of the application.² Indeed it has been held that the plaintiff, instead of making a complete statement of the facts in his application, may make it in reply to the return.³ This doctrine, however, is not a commendable one.⁴ The relator may deny the return and allege other material facts.⁵ The return should show the cause of commitment as specifically and certainly to the judges before whom it is returned as it did to the court or person authorized to commit.⁶

Sec. 661. Return and answer of respondent.—

This respondent, A. L. C., producing the body of T. C. in obedience to the writ of *habeas corpus* hereinbefore issued, says that he is the father of the said T. C., a minor of the age of ten years, and as such father entitled to the care and custody thereof. [*Then give full statement of facts.*]

Respondent denies that the said T. C. is unlawfully restrained of his liberty, and therefore prays that this court will order his said child, T. C., to be remanded to his care, custody and control, and that the said writ herein issued may be quashed, and that the petition herein may be dismissed and the costs of this proceeding adjudged against the petitioner, and for such further relief as is proper.

¹ O. Code, sec. 5782.

⁵ In re Hardigan, 57 Vt. 100.

² People v. Chagary, 18 Wend. 687.

⁶ 9 Am. & Eng. Ency. of Law, p. 189,

³ Slavey v. Seynour, 3 Cliff. 439.

and cases cited.

⁴ Ante, sec. 652.

CHAPTER 43.

HUSBAND AND WIFE.

Sec. 662. Relative duties, rights and liabilities of husband and wife.

663. Petition for recovery of value of necessities furnished wife.

664. Answer that goods furnished wife were not necessities.

Sec. 655. Petition by wife against husband for support.

666. Petition by husband against wife for support.

667. Action by wife for alienation of husband's affections.

Sec. 662. Relative duties, rights and liabilities of husband and wife.—The changes made by statute in Ohio are so sweeping that it becomes impracticable here to give any attention to former decisions. Husband and wife may now enter into any engagement or transaction with each other, or with any other person, which either might do if unmarried. The same rule, however, which controls the actions or contracts of persons occupying confidential relations with each other will apply to such transactions.¹ If one of them exerts influence which arises from the married relation to obtain advantage over the other, it is a fraud for which equity will grant relief.² With the rules of pleading heretofore existing with respect to actions to charge the separate estate of a married woman we have nothing to do. Under existing laws,³ the same obligations are imposed upon the husband as to supporting his wife and children as formerly. He must support his wife and children out of his property or by his labor, and suit may be maintained against him therefor. If he is unable to do so the wife must assist him so far as she is able. And where the wife is able to support a husband who is at no fault, but unable to support himself on account of infirmity, it has been held that he may maintain an action against his wife

¹ R. S., sec. 3112; *Crum v. Sawyer*, 182 Ill. 443.

² *Jackson v. Jackson*, 94 Cal. 446.

³ R. S., sec. 3109 et seq.

to subject her property to the payment of such a sum as may be found necessary for the husband's support.¹ On the other hand, a wife may maintain an independent action against her husband for support without regard to the question of divorce.² The code also gives the right to the wife to file a petition to prevent her husband from wasting or squandering property, or for fraudulently converting the same to his own use, or from placing it beyond her use. The court may enjoin him from interfering with it, and appoint a receiver to manage the same for the benefit of the wife.³ The wife may also sue her husband, or a firm of which he is a member, and he may confess judgment to her.⁴ Suit may now be maintained by and against a married woman as though she were unmarried.⁵ She may recover for personal earnings from another, but not for services performed for her husband in and about his business.⁶ Husband and wife may make any contract with each other,⁷ and may therefore enter into partnership.⁸ Although the statutes have so changed the law that husband and wife may contract with each other, the husband is still the head of the family, and the expenses of the family and for the education of the children in some states are chargeable upon the property of both or either of them in favor of creditors.⁹ This is not true in Ohio. When husband and wife are sued the wife may defend in her own right; and if the husband neglects to defend she may also defend for his right.¹⁰ In such cases a separate answer by the wife may be a complete defense as to both.¹¹

Sec. 663. Petition for recovery of value of necessities furnished wife.—

[*Caption.*]

Plaintiff says that between the — day of —, 18—, and the — day of —, 18—, he furnished to A. B., the wife of the defendant, at her request, certain necessities, and that there is due from said defendant as the husband of the said

¹ *Hickle v. Hickle*, 6 O. C. C. 490,
now pending in supreme court.

² *Earle v. Earle*, 27 Neb. 277; *Beuter v. Beuter* (S. D., 1890), 45 N. W. Rep. 454.
208.

³ O. Code, sec. 5705.

⁴ *Freiler v. Kear*, 22 W. L. R. 326.

⁵ *Card Fabrique Co. v. Stanage*, 29 W. L. R. 415; 51 O. S. —.

⁶ *Switzer v. Kee*, 146 Ill. 577.

⁷ *Crum v. Sawyer*, 182 Ill. 448.

⁸ *Dressel v. Lonsdale*, 46 Ill. App.

454.

⁹ *Tyler v. Sanborn*, 128 Ill. 186.

¹⁰ R. S., sec. 4997.

¹¹ *Lowes v. Redgata*, 42 O. S. 329.

See *ante*, sec. 11.

A. B. on an account for the same the sum of \$—, with interest from the — day of —, 18—, a copy of which is as follows, to wit: [*Copy of account.*]

Plaintiff further states that the said goods so furnished by him to the said A. B. were necessary for her maintenance and support, and that the same were suitable for her in her station and walk of life; that on the — day of —, 18—, and at divers other times he demanded payment therefor of said defendant, which was by him refused.

Wherefore plaintiff asks judgment against said defendant for said sum of \$—, with interest from the — day of —, 18—.

NOTE.—R. S., sec. 3110. See 27 C. L. J. 279. The wife's earnings are her own. Presumptively a husband supplies the house. *Dressel v. Lonsdale*, 46 Ill. App. 454.

Sec. 664. Answer that goods furnished wife are not necessities.—

That the articles set forth in the petition were furnished to the wife [*or, child*] of defendant without his knowledge or consent and were not necessities.

[That the defendant denies that the articles so furnished, or any part thereof, were needful or necessary to her support] [*or, suitable to her situation or the defendant's condition in life*].

Sec. 665. Petition by wife against husband for support.—

That plaintiff and the defendant C. B. were married on the — day of —, 18—, and lived together as husband and wife until the — day of —, 18—, when said C. B. deserted the plaintiff and their children B. B., D. B. and E. B., without cause, leaving them no provision for their support, and has not since that time contributed to or made any provision for their maintenance.

That said B. B. is — years old, said D. B. is — years old, and said E. B. is — years old, and they are now and have been since the — day of —, 18—, living with and supported by the plaintiff.

That the defendant C. B. is the owner in fee-simple of the following described real estate, situated in the county of —, state of Ohio, to wit: [*describe it*], of the value of — dollars, and of the rental value of — dollars per annum.

That said C. B. is also the owner of the following personal property, situated in said county [*describe it*], of the value of — dollars.

That said property is wholly unincumbered, and that said C. B. is [*state his business*], and amply able financially to maintain the plaintiff and her children.

That the plaintiff resided and lived with the defendant C. B.

until his desertion of her, as above stated, and has since lived with her said children at —.

That she has no property or means of her own, and has been compelled since said — day of —, 18—, to support herself and children wholly by her own labor.

That the amount necessary for the support of the plaintiff and her said children is — dollars per annum.

Wherefore plaintiff prays the court for an order authorizing her to rent said real estate and sell said personal property, and to collect the rents and purchase-money thereof, and make all necessary contracts for said purpose, and that judgment be rendered on said note against the defendants R. F. and L. A., and that she be authorized to collect and receipt for the amount due on said judgment, and for all other proper relief.

Sec. 666. Petition by husband against wife for support.

[*Caption.*]

That he has a *bona fide* residence in the county of —, state of Ohio, and that he was on the — day of —, 18—, married to the defendant J. H., and that no children were born of said marriage. That the defendant, together with her son G. W., conspired together to drive plaintiff from his home. That they threatened to take his life and do him some great bodily harm if he did not leave the premises of the defendant. That she threatened him so cruelly, and her said son G. W., at her instigation, and their treatment was so brutal, that on the — day of —, 18—, plaintiff was compelled, on account of fear of great bodily harm, to leave and did leave the premises of the defendant, where they resided. That defendant well knew, at and prior to the time of their said marriage, that plaintiff was possessed of no property. That prior to said marriage they talked about this matter, and that defendant said she knew he had no property but that made no difference, for she had plenty for both of them. That while they so lived together plaintiff treated her kindly and did all in his power to make their home a happy one. That he employed himself as best he could in looking after her financial interest, and did all he could to take care of and manage her property in a good husband-like manner. Plaintiff states that he is — years of age and is not able physically to earn means with which to supply himself with the necessities of life; that he has no means whatever, and is now residing temporarily with — —, on whose charity he is now living. That the defendant owns and is possessed of the following described real property, to wit: [*Description.*]

That the rents and profits which the said defendant derives from said property amount to — dollars. That she is pos-

sessed of and has ample and abundant means with which to support both plaintiff and defendant. That he is unable to support himself and wife, but that the defendant is able to do so, but refuses to render support or assistance to this plaintiff.

Wherefore plaintiff asks that the court may decree him, out of the proceeds arising from the rents of the lands of defendant, a reasonable amount of money for his maintenance and support, and for all and any relief that the facts of the case may warrant.

NOTE.—Adapted from *Hickle v. Hickle*, 6 O. C. C. 490—Pike County O. C. C., now pending in Supreme Court

Sec. 667. Action by wife for alienation of husband's affections.—There has been considerable litigation upon the subject of the right of the wife to sue for alienation of her husband's affections, and under the statutes of the different states the courts are not in accord upon the question of her right to maintain the action on her own account.¹ In Ohio, however, prior to the adoption of the statute making changes in her legal status, her right to maintain an action for the loss of the society and companionship of her husband against one who wrongfully induces and procures him to abandon her was recognized.² Some courts give her this right upon the theory that it is a violation of her personal right, and therefore an injury to the person. Others proceed upon the principle that it is an injury to property, and others sustain the doctrine without regard to any statute.³ The doctrine that the wife may, under the modern statutes giving her equal rights with her husband, sue in her own name any one who has enticed her husband from her or alienated his affections and deprived her of his society, is well supported.⁴ It is held, however, that the wife cannot maintain an action where, acting upon the advice of counsel, she leaves her husband, and subsequently brings a divorce resulting in a decree of separation.⁵

¹ See *Seaver v. Adams*, 24 W. L. B. 584; 23 N. E. Rep. 17 (1889); *Holmes* 121 (N. H.); *Duffies v. Duffies*, 76 Wis. 374; s. c., 24 W. L. B. 374. *v. Holmes*, 133 Ind. 386; 33 N. E. Rep. 932 (Ind., 1893).

² *Westlake v. Westlake*, 34 O. S. 621. For form of petition see this case. *Clark v. Harlan*, 1 C. S. C. R. 418.

³ *Bennett v. Bennett*, 116 N. Y.

⁴ *Bennett v. Bennett*, *supra*, and cases reviewed; 24 W. L. B. 121.

⁵ *Buckel v. Suss*, 21 N. Y. S. 907; s. c., 13 N. Y. S. 719; *Rudd v*

Rounds, 64 Vt. 432.

CHAPTER 44.

INDEMNITY.

Sec. 668. Actions on an indemnity.

669. Petition for defending action for money of another paid by plaintiff to defendant.

Sec. 670. Petition for damages incurred by accepting bill for accommodation of defendant.

671. Petition on promise to save party harmless.

Sec. 668. Actions on an indemnity.—The doctrine seems to be now settled that if there be a contract to indemnify simply, and nothing more, then damage must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act or to pay a certain sum of money, then it is no defense to say that the plaintiff has not been damaged; the measure of damages in such cases is the amount agreed to be paid.¹ Where a party by contract indemnifies another against all liability on certain obligations to pay, such indemnified party has a cause of action against the party giving him the contract of indemnity when judgment is obtained against him on such obligation.* An indorser is entitled to the benefit of an indemnity upon being informed by the principal that he can not pay the amount of indebtedness, when he pays the same to save the note from going to protest.² Where an indorser gives a note which is accepted in payment of the original note, it is considered equivalent to

¹ *Wilson v. Stilwell*, 9 O. S. 467. Security given by a principal to his surety in order to avail a creditor must be conditioned to secure the debt and enforceable for its payment; if it is merely to indemnify the surety it cannot be enforced until he has sustained loss. *Pool v. Doster*, 59 Miss. 258. If a mortgage is given by one to indemnify a surety, his right of action does not accrue until he has paid the debt. *McLean v. Ragsdale*, 81 Miss. 701. Though a contract of indemnity merely cannot be sued upon for the liability or exposure to loss until actual damage capable of appreciation has been sustained, yet

where the contract is to perform some act, the neglect is a breach, and will give immediate action. *Lathrop v. Hatwood*, 21 Conn. 117. Where the condition of a mortgage is to save the mortgagee harmless from the payment of a debt owing by the mortgagor for which the mortgagee was surety, no action can be maintained on the mortgage until the mortgagee has paid the debt. *Forbes v. McCoy*, 15 Neb. 632. See further, *Collier v. Ervine*, 2 Mont. 335; *Stout v. Folger*, 34 Ia. 74; *Maloney v. Nelson*, 24 N. Y. S. 147; *Port v. Jackson*, 17 John. 239.

² *Bank v. Davis*, 24 O. S. 190.

* *Pratt v. Walworth*, 15 O. C. C. 412; 8 Oh. Dec. 472.

payment in money, so as to entitle him to an action upon an indemnity before he has in fact paid the money.¹ The rule that where the principal indemnifies one of several sureties each is entitled to share therein does not apply where such indemnity is furnished by a stranger. Where the wife of a principal mortgages her realty for the benefit of one of her husband's sureties, the same will not inure to the benefit of his co-surety.² But a mortgage executed to one of several sureties upon the bond of an officer inures to the benefit of all, as well as additional sureties.³ A verbal promise by a judgment creditor to indemnify an officer holding an execution for any damages arising from the seizure or sale of property claimed by the debtor to be exempt is not within the statute of frauds, but is an original promise.⁴

Sec. 669. Petition for defending action for money of another paid by plaintiff to defendant.—

That on the — day of —, 18—, the plaintiff, having — dollars belonging to A. B., at the defendant's request delivered the same to him, the defendant, who claimed it, and not knowing to whom it belonged.

That the said A. B. then threatened to bring an action against plaintiff for said money; and therefore on the — day of —, 18—, plaintiff, at the defendant's request, agreed with him, the defendant, to defend said action of A. B. for said money, in consideration whereof the defendant promised to save plaintiff harmless from the consequences of said action. [*Here insert substance of indemnity.*]

Thereafter the said A. B. prosecuted an action against plaintiff for said money in the — court of the state of Ohio, of which the defendant had notice, wherein — — was plaintiff and — — was defendant, being cause numbered —. That plaintiff, with the privity of the defendant and in compliance with his said agreement, defended said action to the best of his ability, but said A. B. by the consideration of said court, on the — day of —, 18—, recovered a judgment against the plaintiff in said action for — dollars, and — dollars costs, which plaintiff was compelled to and did pay, and plaintiff was put to further expense of — dollars in defending said action.

That said sums, amounting to — dollars, are now due from the defendant to plaintiff and unpaid.

NOTE.— Changed from Thornton's Forms.

¹ Bausman v. Guaranty Co., 47 Minn. 377.

² Bank v. Teeters, 81 O. S. 36.

⁴ Mays v. Joseph, 84 O. S. 22.

³ Leggett v. McClelland, 89 O. S. 624.

Sec. 670. Petition for damages incurred by accepting bill for accommodation of defendant.—

Plaintiff says that on the — day of —, 18—, he entered into an agreement with the said defendant that he would accept for the accommodation of said defendant a certain bill of exchange bearing date —, 18—, drawn by defendant on plaintiff, payable at sight, to the order of defendant, in the sum of — dollars, and to deliver the same to the defendant, to be negotiated by him for his own benefit. Defendant promised, in consideration of the agreement on the part of this plaintiff as aforesaid, that he would hold plaintiff harmless from any loss or damage by reason of said acceptance.

Plaintiff did, on said day, accept said bill of exchange and delivered it to defendant for his accommodation, and defendant negotiated the same.

That on the — day of —, 18—, plaintiff, as such acceptor, was called upon and obliged to pay R. F., the holder thereof, the amount therein specified, with interest and costs of an action brought upon said bill in the — court of common pleas of — county, Ohio, against plaintiff, and plaintiff was obliged to and did pay — dollars costs in defending said action.

That by reason of the above-mentioned facts plaintiff has been damaged to the amount of said sums, being — dollars, no part of which has been paid, and which is now due.

NOTE.— Changed from Thornton's Form.

Sec. 671. Petition on a promise to save surety harmless.

That the said defendant, on the — day of —, 18—, in consideration that he, the said plaintiff, would by his bond or writing obligatory, bearing date on the day and year aforesaid, become held and firmly bound as surety for one J. B. unto A. A., then sheriff of the county of —, in the penal sum of — dollars, to be paid, etc. [*describing the penal part of the said bond*], and which said bond or writing obligatory was to contain a certain condition that if, etc. [*here set forth condition substantially*], he, the said defendant, would indemnify and save harmless him, the said plaintiff, of, from and against all damages, costs and charges which he might sustain or be put to, for or by reason of his becoming surety as aforesaid, in manner aforesaid, for the said J. B.; and the said plaintiff, confiding in such promise and undertaking of the said defendant in manner aforesaid made to said plaintiff, did, in consideration thereof, duly execute and deliver the aforesaid bond or writing obligatory unto the said A. A.

And the plaintiff further alleges that [*here state when and in what manner the plaintiff was damaged in consequence of his becoming surety*], of all which the said defendant afterwards, to wit, on, etc., had due notice, but that the defendant has not paid the said amount or any part thereof.

[*Prayer.*]

CHAPTER 45.

INFANTS.

Sec. 672. Actions by infants.

673. Actions against an infant.

674. Petition against infant for necessities furnished.

675. Defense by infant.

Sec. 676. Answer claiming infancy when contract was made.

677. Answer of parent that goods furnished minor child were not necessities.

Sec. 672. Actions by infants.—The statute of limitation begins to run against a minor upon his arrival at the age of majority.¹ An action by an infant must be brought by his guardian or next friend; if brought by a next friend, the court may dismiss it if it is not for the benefit of the infant, or substitute the guardian or any person as the next friend.² The verification of the petition may be by the agent or attorney of the infant.³ The next friend is made liable for the costs of an action brought by him, and, if he is insolvent, the court may upon motion require security.⁴ The infant is not liable to judgment for costs.⁵ The court may remove a guardian *ad litem* upon failure to faithfully perform his duties and appoint another in his stead.⁶ Minority is a fact which must be distinctly averred in an action that it may be traversed.⁷ The jurisdiction of equity to protect infants is not limited to cases where there is a fiduciary relation, but is extended to all cases where influence is acquired and abused, or confidence reposed and betrayed.⁸ An infant may rescind any contract made by him during minority, except one for the purchase of necessities, and prosecute an action for the recovery of any consideration paid by him.⁹

Sec. 673. Actions against an infant.—A contract by an infant is voidable only, and will become valid and enforceable

¹ Slater v. Cane, 8 O. S. 80.

² O. Code, sec. 4998.

³ O. Code, sec. 5109.

⁴ O. Code, sec. 4999.

⁵ Kleffell v. Bullock, 8 Neb. 386.

⁶ O. Code, sec. 5001.

⁷ Hanly v. Levin, 5 O. 227, 228.

⁸ Long v. Mulford, 17 O. S. 435.

⁹ Lemmon v. Beeman, 45 O. S. 505.

upon his ratification upon arriving at the age of majority;¹ he cannot avoid a portion and affirm the remainder, but must rescind the whole of it.² It seems to be generally conceded that an infant affirms a contract made by him during minority by remaining silent beyond a reasonable time after he becomes of age.³ While the law protects an infant from contracts made during minority, it will not relieve him from responsibility for a tort committed by him. He is held liable for any careless, negligent or intentional injury;⁴ and is liable also for stock in a corporation purchased by him during minority but held until majority.⁵ A person having control of an infant should first surrender the advantages arising from his fiduciary capacity before he prosecutes a suit against the infant in which any defense is made.⁶ The doctrine that an infant is not liable on a note given for necessities is well supported; nor can he be held liable in an action thereon, either by a payee or by a surety.⁷

Sec. 674. Petition against parent for necessities furnished.—

Plaintiff says that the defendant A. B. is the father of C. D., who is a minor of the age of — years, and that between the — day of —, 18—, and the — day of —, 18—, he furnished the said defendant's minor son articles which were necessary for the maintenance and support of said minor son, and that there is due therefor from said defendant A. B. as such parent, upon an account for said necessities so furnished by this plaintiff, the sum of \$—, with interest from the — day of —, 18—, a copy of which account is as follows, to wit: [*Copy of account.*]

Plaintiff further says that on the — day of —, 18—, he

¹ Harner v. Dipple, 81 O. S. 72. There are many decisions to the effect that an infant's contract is voidable, and may be avoided by him during his infancy or on his arrival at full age. Ayers v. Burns, 87 Ind. 248, and cases cited.

² Curtiss v. McDougal, 26 O. S. 66; Morse v. Wheeler, 4 Allen, 570; Taft v. Sergeant, 18 Barb. 320.

³ Langdon v. Clayson, 75 Mich. 204; Buchanan v. Hubbard, 128 Ind. 187; Dillon v. Burnham, 43 Kan. 77.

⁴ Bullock v. Babcock, 8 Wend. 891; Conklin v. Thompson, 29 Barb. 218; Peigne v. Sutcliffe, 17 Am. Dec. 756; Peterson v. Haffner, 59 Ind. 103; 26 Am. Rep. 354; Field on Infants, sec. 23.

⁵ Hardman v. Railway Co., 15 W. L. B. 164.

⁶ Long v. Mulford, 17 O. S. 485.

⁷ Henderson v. Fox, 5 Ind. 489; Ayers v. Burns, 87 Ind. 245; Price v. Sanders, 60 Ind. 810; Tyler on Infancy (2d ed.), p. 111.

demanded payment therefor from said defendant, which was refused.

Wherefore plaintiff asks judgment against said defendant for said sum of \$——, with interest, etc.

NOTE.—Food, clothing, lodging and medical attendance come within the term necessities; it also includes all articles suitable to the station of life. *Price v. Sanders*, 60 Ind. 810. It is a question to be determined by the jury. *Garr v. Haskett*, 86 Ind. 373. In an action against a parent for necessities the plaintiff should allege the circumstances from which a promise by the parent to pay for the same may be implied. *Ramsey v. Ramsey*, 121 Ind. 215.

Sec. 675. Defenses by infant.—The defense of an infant to a suit must be made by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof;¹ and an appointment cannot be made until the minor has been properly served.² It is the duty of the guardian *ad litem* to make a proper defense and bring before the court all the rights of his ward; and the infant is entitled to his day in court before an absolute decree can be taken against him.³ The answer should deny all material allegations in the petition which are prejudicial.⁴ An answer by a guardian *ad litem* alleging his ignorance of the matters contained in the petition, and praying that the rights of his ward be protected, is in effect a general denial.⁵ A guardian defending an action for an infant is relieved from verifying his pleading.⁶ Infancy, when pleaded, is a valid defense to an action for breach of promise.⁷ A defense by a minor that, at the time he ratified a contract made in his minority, he did not know that he was legally liable thereon, is not good.⁸ A decree rendered against minor defendants upon the answer of a guardian *ad litem* may be impeached for fraud;⁹ and a decree against minor defendants who have not been served with process is void.¹⁰

¹ O. Code, sec. 5003.

² O. Code, secs. 5004, 5047; *Keys v. McDonald*, 1 Handy, 287.

³ *Long v. Mulford*, 17 O. S. 435. See *St. Clair v. Smith*, 8 O. 364; *Morgan v. Burnet*, 18 O. 535. A decree cannot be taken against an infant by default, but the plaintiff must prove his case. *Massie v. Donaldson*, 8 O. 377.

⁴ O. Code, sec. 5073.

⁵ *Wood v. Butler*, 23 O. S. 520.

⁶ O. Code, sec. 5103.

⁷ *Rush v. Wick*, 31 O. S. 531.

⁸ *Anderson v. Seward*, 40 O. 325.

⁹ *Massie v. Matthews*, 13 O. 351.

¹⁰ *Moore v. Starks*, 1 O. S. 369. See *Robb v. Irwin*, 15 O. 689.

Sec. 676. Answer claiming infancy when contract was made.—

That he admits the making of the contract sued on, and that he received from the defendant in consideration thereof — dollars [*or*, the following property, *describe it*].

That the defendant was at the time of making said contract an infant under the age of twenty-one years.

That within a reasonable time after he arrived of age, to wit, on the — day of —, 18—, he tendered to the plaintiff said sum of — dollars [*or*, said property] and demanded the redelivery to him and rescission of said contract, but the plaintiff refused.

NOTE.— The true doctrine is that no contract of an infant is absolutely void. 1 Parsons on Cont., 295, 328; Harner v. Dipple, 81 O. S. 72; Lemmon v. Beeman, 45 O. S. 509; Owen v. Long, 112 Mass. 408; Anderson v. Seward, 40 O. S. 328. The privilege of affirming or disaffirming a contract is personal to the infant, and not available to third persons. Lemmon v. Beeman, *supra*.

Sec. 677. Answer of parent that goods furnished minor child were not necessities.—

Defendant for answer to the petition herein says that he admits that C. D. is his minor child, but that the goods set forth in the petition were not furnished to his said minor son with his knowledge or consent, and denies that the goods so furnished, or any portion thereof, were necessary for the support or maintenance of his said minor child.

Wherefore, etc.

CHAPTER 46.

INJUNCTION.

Sec. 678. Injunction defined.	Sec. 689. Petition to enjoin partner from engaging in business after dissolution of partnership contrary to agreement.
679. When and by whom granted.	690. Petition to enjoin judicial sale of real estate.
680. Causes for which injunction will lie.	691. Petition to enjoin sale of exempt property under execution.
681. When it will not lie.	691a. Petition to restrain strikers from interfering with business.
682. Pleading and practice.	691b. Petition to enjoin railroad strikers.
683. Motion to vacate.	
684. Second application.	
685. Petition to enjoin infringement of trade-mark.	
686. Petition to enjoin nuisance caused by noise.	
687. Petition to enjoin operation of slaughter-house.	
688. Petition to enjoin waste and for damages.	

Sec. 678. Injunction defined.—Injunction is a command to refrain from a particular act; it may be the final judgment in an action, or it may be allowed as a provisional remedy; and when so allowed it shall be by order.¹

Sec. 679. When and by whom granted.—The supreme court, the circuit court, the common pleas court, or a judge of either, or a judge of the probate court, may grant an injunction. An injunction may be granted at the time of the commencement of the suit, or at any time afterwards before judgment. In the absence of the respective judges from the county, the probate judge may grant an injunction. If an injunction has been vacated in the common pleas court, and an appeal taken to the circuit court, the latter may grant an injunction at any time before judgment in that court upon its appearing satisfactorily by affidavits that the party is entitled thereto. Upon like proof an injunction will be allowed during the pendency of proceedings in error.² A judge of the supreme court at chambers cannot grant or dissolve an injunction in a case pending in another court.³ The supreme

¹ O. Code, sec. 5572.

² O. Code, sec. 5573.

³ *Railway Co. v. Hurd*, 17 O. S. 144;
Keut v. Mahaffy, 2 O. S. 498.

court may allow a temporary injunction when it appears that the defendant threatens to do acts which would make the judgment to be rendered in the action ineffectual.¹ The provision conferring power upon the judge of the probate court to grant injunctions in actions pending in other courts of the state, in the absence of the judges from the county, is not in conflict with the constitution.²

Sec. 680. Causes for which injunction will lie.—An injunction will lie to restrain the commissioners of a county from letting or contracting for work in constructing an improvement where the proceedings leading up to the determination of making the improvement have been irregular;³ or to enjoin them from appropriating or expending money in the construction of a road until the right of way has been properly obtained;⁴ or to prevent them from levying a tax,⁵ or from entering into a contract, contrary to law.⁶

Equity will interfere with the management of the affairs of a corporation at the suit of stockholders only where their proposed action is plainly illegal.⁷ A preliminary injunction to restrain directors of a corporation from making an assignment, or from disposing of its assets, has been granted in an action to enforce the statutory liability, where the insolvency of the corporation is apparent.⁸ Unlawful and injurious discrimination committed or threatened by a common carrier may be enjoined.⁹ Equity will grant relief in contracts and enforce by injunction a stipulation in a deed that the grantee will not use premises for certain purposes;¹⁰ and it will prevent a breach of a contract where the provisions are plain and the

¹ *Wagner v. Railway Co.*, 88 O. S. 33; *Yeoman v. Lasley*, 86 O. S. 416.

² *Phelon v. Railroad Co.*, 5 O. C. C. 545.

³ *Makemson v. Kauffman*, 85 O. S. 444; *Varnholt v. Gordon*, 80 W. L. B. 83.

⁴ *State v. Commissioners*, 39 O. S. 58; *Hayes v. Jones*, 27 O. S. 218.

⁵ *Commissioners v. Croweg*, 24 O. S. 492.

⁶ *Ruffner v. Commissioners*, 1 Disn. 39; *McArthur v. Kelly*, 5 O. 132.

⁷ *Lomis v. Dexter*, 20 W. L. B. 5; *Cook on Stock & S.*, sec. 677; *State v. Smith*, 48 Vt. 268.

⁸ *Upson v. Quarry Co.*, 2 Clev. Rep. 355.

⁹ *Schofield v. Railway Co.*, 43 O. S. 571.

¹⁰ *Stines v. Dorman*, 25 O. S. 580; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35. Such an agreement binds all subsequent grantees. *Id.*; *Barrow v. Richard*, 8 Paige, 351.

alleged breach is not disputed.¹ An injunction will lie in behalf of a devisee against the son of a testator to prevent the latter from performing certain acts pending the determination of legal rights.² An injunction has been allowed to prevent the erection of poles in a street without the consent of abutting property owners;³ to prevent the laying of pipes through streets, with the consent of the city, for the purpose of transporting and selling gas, without compensation to the owners of the fee therein;⁴ and to prevent a natural-gas company from refusing to furnish gas to a person claiming the right to do so under an unreasonable ordinance which the court *must* declare void.⁵ An injunction will lie to restrain the enforcement of a judgment, even where the record shows on its face that service was properly made. That this relief may be granted it must appear that there was fraud, collusion or misconduct in procuring the same, and it must also be shown that the defendant would have a good defense if the judgment were set aside.⁶ It will not be granted where errors complained of are disclosed by the record even though the judgment be thereby rendered void, as there is an adequate remedy by proceeding in error.⁷ To enjoin a judgment at law on the ground of illegal interest the bill should show a tender of the amount equitably due.⁸ A sale of the property of the wife will be enjoined on an execution against the husband, even where there is an adequate remedy at law.⁹ It will lie to prevent a creditor of a husband from selling property of the wife on execution.¹⁰ A sale by a sheriff by virtue of an execution under a void judgment in attachment proceedings may be restrained by injunction.¹¹ It is not necessary to make a sheriff a party to an action to enjoin a judgment upon which execution is issued.¹² And where no objection is made to the mode of proceedings, relief by injunction will be granted against the enforcement of an execution.¹³

¹ Lacey v. Heuck, 12 W. L. B. 209; 85; Gifford v. Commissioners, 37 O. S. Paragon Oil Co. v. Hall, 7 O. C. C. 502; Haff v. Fuller, 45 O. S. 498. 240.

² Piatt v. Piatt, 2 Disn. 408.

³ McLean v. Electric Light Co., 9 W. L. B. 65. See Met. Tel. Co. v. Coldwell Lead Co., 12 W. L. B. 104.

⁴ Webb v. Ohio Gas Fuel Co., 16 W. L. B. 121.

⁵ Toledo v. Gas Co., 5 O. C. C. 557.

⁶ Dixon v. Varnish Co., 21 W. L. B. 258; McCurdy v. Baughman, 43 O. S.

⁷ Haff v. Fuller, 45 O. S. 497, and authority cited.

⁸ Shelton v. Gill, 11 O. 417.

⁹ McCleary v. Snider, 1 W. L. M. 270.

¹⁰ Scheferling v. Huffman, 4 O. S. 241.

¹¹ Wood v. Stanberry, 21 O. S. 142.

¹² Allen v. Medill, 14 O. 445.

¹³ Miller v. Longacre, 26 O. S. 291; Crawford v. Thurmond, 3 Leigh. 85

The treatment accorded labor unions by courts in recent decisions has had the effect of interfering with their methods to a great extent. The right of workmen to combine for their own protection, and to persuade, in a reasonable manner, fellow-laborers to abstain from working, is clearly recognized. The legality or illegality of any of their acts must be determined by the manner of their performance. The moment, however, they step beyond the boundary line of a "reasonable manner," and attempt to accomplish their ends by means of threats, intimidation, violence or obstruction, and interfere with the rights of and cause injury to others, the law will interpose an objection and prevent the same; and it goes to the extent of allowing a remedy by injunction to prevent strikers from acts tending to the ultimate destruction of or interference with property.¹ The remedy has been allowed also against persons who have entered into a conspiracy to compel a common carrier to refuse to receive and handle certain freight.²

A lessor may maintain an action against an assignee of his lessee to prevent him from making such use of the premises as will amount to a violation of the terms of the lease.³ And it will lie in favor of a mill-owner, who has a lease from the officials of the state to use a certain amount of water, to prevent a subsequent lessee from drawing water from the same source in such a manner as to interfere with his prior right.⁴ It is the proper remedy also to determine a disputed question as to the amount of money to be paid to the state as a license.⁵ It has been held also that a temporary injunction will lie to prevent municipal authorities from closing up a man's business, as being in the nature of an interfer-

¹ Perkins v. Rogg, 27 W. L. B. 32 Chicago Legal News, 41. See Railway Co. v. Railway Co., 29 W. L. B. (Cin. Super. Ct., 1892); Springhead Spinning Co. v. Riley, L. R. 6 Eq. 227.

Cases, 557; N. Y., L. E. & W. R. Co. v. Wenger, 17 W. L. B. 306. Injunction W. L. B. 233 (U. S. C. C. N. D. O.).

has been granted to prevent labor unions from interfering with work-² Railway Co. v. Railway Co., 29 S. C. R. 6.

men. Coeur D'Alene Consolidated³ Detwiler v. Toledo, 5 O. C. C. 360.

& Mining Co. v. Miners' Union of⁴ State ex rel. v. Hahn, 30 W. L. B. 391; s. c., 50 O. S. 714.

Warder et al., 29 W. L. B. 60; 25

ence with property.¹ And it will lie against a municipality to prevent the pollution of a stream from a sewer.²

A city solicitor may apply in the name of a corporation for an injunction against a misappropriation of its funds, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of laws or ordinances giving the same, or which was procured by fraud on the corporation.³ If the solicitor fails to bring the suit, a tax-payer may maintain it in his own name on behalf of the corporation.⁴ To sustain an action under this provision, it must be based upon defects or irregularities which are plainly jurisdictional or of such a character that the equity or justice of the case demands interference by the court.⁵ The city solicitor may file a petition for an injunction in the name of a tax-payer with his consent, without it being made to appear that he had been requested in writing by the tax-payer to do so;⁶ and it should be in the name of the tax-payer, on behalf of the corporation, and not simply as a tax-payer.⁷ When the suit is brought by a city solicitor it is not necessary to give a bond.⁸ A property owner sustaining special damages may maintain an action to prevent the carrying on of a business in such a manner as to become a nuisance.⁹ A partner may enjoin his copartner from engaging, during the existence of a partnership, in a business in competition with that carried on by the partnership;¹⁰ and the use of the firm name by his former partner may be enjoined by a retiring partner upon dissolution.¹¹

Injunction will lie to restrain an attachment proceeding against exempt property;¹² and under special circumstances to

¹ *Ryan v. Jacob*, 6 W. L. B. 139.

² *Cilly v. Cincinnati*, 2 W. L. B. 135.

³ R. S., sec. 1777, as amended 87 O. L. 122.

⁴ R. S., sec. 1779; *Miller v. Pearce*, 2 C. S. C. R. 44; *Mathers v. Cincinnati*, 3 W. L. B. 709; *Haskins v. Street Railroad Co.*, 4 W. L. B. 1126; *Findlay Gas Light Co. v. Findlay*, 2 O. C. C. 237.

⁵ *Sloane v. Railway Co.*, 5 O. C. C. 84.

⁶ *Cincinnati Street R. Co. v. Smith*, 29 O. S. 291.

⁷ *Hensly v. Hamilton*, 8 O. C. C. 201.

⁸ *Forsythe v. Winans*, 44 O. S. 377.

⁹ *Barkau v. Knecht*, 10 W. L. B. 342. See *Schuelter v. Billingsheimer*, 14 W. L. B. 224.

¹⁰ *Halladay v. Faurot*, 9 W. L. B. 92.

¹¹ *McGowan v. McGowan*, 23 O. S. 370.

¹² *Snook v. Snetzer*, 25 O. S. 516.

enforce the execution of a trust, and to preserve the property from waste;¹ or to prevent the unlawful use of a school-house.² Although injunction is not the proper remedy to try title to public offices, or to determine questions concerning the authority to make appointments thereto, it may be employed by an incumbent to protect his possession against interference by an adverse claimant whose title is in dispute, until it shall have been established by law.³ It will also lie to prevent a disclosure or unauthorized use of an invention of a secret process;⁴ or to prevent the collection of notes given for a void patent-right;⁵ or to prevent the construction of a railroad in the streets of a city until a right has been first obtained;⁶ or to prevent the removal or sale on execution of portions of mortgaged property of a railroad company, when the whole property mortgaged is admitted to be inadequate security for the payment of the mortgage debts.⁷ After a railroad company has taken possession of a right of way and located and completed its road, an injunction will issue to restrain the company from taking any additional part of such land.⁸

The construction of a street railway without the consent of property owners may be enjoined.⁹ It will lie to prevent the collection of taxes illegally imposed,¹⁰ and to restrain a county auditor from improperly placing property on the tax duplicate,¹¹ although he will not be enjoined from placing upon the duplicate, valuation of property returned by an assessor until all other remedies have been exhausted.¹² It will also lie to restrain the collection of a special tax levied by the city council

¹ Winslow v. Iron & Nail Factory, 41; Street Railway Co. v. Cumminville, 14 O. S. 524.
¹ Disn. 229.

² Weir v. Day, 35 O. S. 148.

⁷ Lane v. Railroad Co., 17 O. S. 642.

³ Remelin v. Mosby, 25 W. L. B. 120; 47 O. S. 570; Guillote v. Poincy, 6 S. Rep. 507; 41 La. Ann. 333; Kerr v. Trego, 47 Pa. St. 292; 2 High on Inj., sec. 1815.

⁸ Warner v. Railroad Co., 39 O. S. 70.

⁴ Cincinnati Bell Foundry Co. v. Dobbs, 19 W. L. B. 84.

⁹ Roberts v. Easton, 19 O. S. 78.

⁵ Darst v. Brockway, 11 O. 462.

¹⁰ Frazer v. Seibern, 16 O. S. 614; Mitchell v. Treasurer, 25 O. S. 148; Cincinnati Gas Light & Coke Co. v. Bowman, 1 Handy, 289.

⁶ Railway Co. v. Lawrence, 38 O. S.

¹¹ Jones v. Davis, 35 O. S. 474.

¹² Mills v. Board, 1 C. S. C. R. 566.

without authority of law.¹ It is a well-established doctrine that it is within the peculiar province of equity to interfere and regulate the use of and define and limit the rights of disputing claimants in the same water-power or privilege.²

Sec. 681. When it will not lie.—An injunction will not of course lie when there is an adequate remedy at law.³ A person must not sleep on his rights and then expect a court of equity to grant him relief.⁴ A person desiring to protect rights by this remedy must show himself prompt and vigilant in their assertion. He cannot wait until the mischief is done and great expenditures have been made by other parties, as it will be implied that he acquiesces.⁵ Thus, where a property owner has permitted an improvement to be made upon his land without objection, he cannot be allowed to maintain an injunction to restrain the collection of a tax or assessment levied for the payment thereof.⁶ But this rule cannot apply to one having no notice of the improvement,⁷ nor where the law under which the improvement is made is unconstitutional;⁸ nor can the appropriation of property be enjoined on the ground that compensation has not been made, where the owner had actual knowledge of the appropriation proceedings and failed to present his application for compensation.⁹ A person who stands by and sees property taken by a railroad company without objection cannot, after a road has been constructed thereon, enjoin the company from using the same.¹⁰ An injunction will be denied where it appears that the plaintiff acquiesced in the matters complained of.¹¹ Injunction is frequently resorted to as a means of obtaining specific performance. And while there is some conflict, the apparent weight of authority sustains the doctrine that an injunction will not

¹ *Culbertson v. Cincinnati*, 16 O. 574.

² *Raulet v. Cook*, 44 N. H. 512; *Burnham v. Kempton*, 44 N. H. 78; *Detweiler v. Toledo*, 5 O. C. C. 378; *Lembeck v. Nye*, 47 O. S. 836.

³ *Crocket v. Crocket*, 2 O. S. 180.

⁴ *Hanson v. Craighead*, 4 W. L. B. 500.

⁵ *Chapman v. Railroad Co.*, 6 O. S. 136.

⁶ *Teegarden v. Davis*, 36 O. S. 601;

Kellogg v. Ely, 15 O. S. 64. See

Duhme v. Jones, 9 W. L. B. 293.

⁷ *Teegarden v. Davis*, *supra*.

⁸ *Wright v. Thomas*, 26 O. S. 346.

⁹ *Reckner v. Warner*, 22 O. S. 275.

¹⁰ *Goodin v. Canal Co.*, 18 O. S. 169.

¹¹ *Railroad Co. v. Railroad Co.*, 1 O. C. C. 100.

issue to restrain a breach of a negative covenant, the effect of which would be to compel the specific performance of affirmative covenants, unless the affirmative stipulation of the complaining party can be specifically enforced against him.¹ Nor will specific performance be compelled where the benefit of a contract cannot be realized in accordance with its terms.²

Whenever a court is called upon to grant a mandatory injunction to enforce the specific performance of a contract, it will act with great caution;³ nor will an injunction lie to prevent a defendant from violating the terms of a contract where there is doubt in reference to the matter, but will leave the parties to their remedy at law.⁴ Nor will it lie to control the discretion of a city council,⁵ or to prevent it from removing a market-house, or abandoning a locality for market purposes;⁶ nor to restrain the publication of an anticipated libel or slander;⁷ nor to restrain labor organizations from the circulation of libels on the business or character of a merchant;⁸ nor to prevent the enforcement of a judgment on the ground of negligence of an attorney,⁹ or on the ground that the case was compromised by the attorney without authority;¹⁰ nor to enjoin a nuisance until the complainant has first established his right to relief at law.¹¹ If the question as to whether or not a certain thing is a nuisance is a question of fact, an injunction should not issue.¹² Nor will the remedy be allowed at the suit of a county auditor, after his term has expired, to restrain the commissioners from appointing a suitable person to fill a vacancy in the office;¹³ nor to prevent the county

¹ *Steinau v. Gas Co.*, 48 O. S. 524; *Pomeroy on Contracts*, sec. 168; *Bailey v. Collins*, 59 N. H. 459; *Pingle v. Connor*, 66 Mich. 187; *Publishing Co. v. Tel. Co.*, 88 Ala. 498; *Meason v. Kaine*, 63 Pa. St. 335; *Richmond v. Railway Co.*, 33 Ia. 422.

² *Railroad Co. v. Telegraph Co.*, 38 O. S. 24.

³ *Cincinnati v. Street Railroad Co.*, 2 W. L. B. 17.

⁴ *Bryan v. Chyne*, 23 W. L. B. 165.

⁵ *Wasem v. Cincinnati*, 2 C. S. C. R. 64.

⁶ *Gall v. Cincinnati*, 18 O. S. 563.

⁷ *Dopp v. Doll*, 13 W. L. B. 335.

⁸ *Richter v. Tailors' Union*, 24 W. L. B. 189. Though this seems doubtful under recent decisions. See *ante*, sec. 680, p. 631, n. 1.

⁹ *Barhorst v. Armstrong*, 24 W. L. B. 58.

¹⁰ *Boyle v. Beattie*, 2 C. S. C. R. 490.

¹¹ *Goodall v. Crofton*, 33 O. S. 371. See *Gilbert v. Showerman*, 23 Mich. 448.

¹² *Board of Health v. Purden*, 14 W. L. B. 215.

¹³ *Robbins v. Board*, 2 O. C. C. 23.

commissioners from levying a tax to support a joint sub-school district established by the probate court;¹ nor to prevent the removal of a police officer;² nor to enjoin the violation of a Sunday law at the suit of a private citizen.*

A contract for personal services cannot be enforced by injunction unless the person sought to be enjoined is possessed of exceptional skill and ability, and a breach thereof would result in irreparable injury.³ But where the breach of a contract is not disputed an injunction may issue.⁴ An injunction will not be allowed in such cases to prevent the defendant from contracting with others unless the contract and alleged breach are clear.⁵

An alleged threatened obstruction to a right of way claimed by prescription will not be enjoined unless it appears that the use has been adverse, uninterrupted, continuous and with the knowledge of the owner, and existing for a period of twenty-one years.⁶ Nor will injunction lie to interfere with a street railway in extending its lines upon the application of a person who has put in a bid before a city council, nor to compel the city council to accept his bid because it is the lowest.⁷ Nor will it lie to restrain an execution and sale of railroad property, a portion of which is covered by mortgage under a judgment, on the ground that the same is needed to conduct the business of the company and to enable it to raise money to pay the interest on the mortgage.⁸ Nor can an abutting property owner enjoin a telegraph company to prevent it from placing additional wires on poles in the street in front of his premises.⁹ Nor will it lie to prevent a trespass which may be compensated for in an action at law;¹⁰ nor to prevent one of several tenants from exclusively using certain space for sign purposes, when the one so using the same had prior possession;¹¹ nor to restrain the prosecution of criminal proceedings.¹²

¹ Board v. Stuck, 39 O. S. 259. The judgment of a probate court is final unless reversed on error.

² Reeves v. Griffin, 29 W. L. B. 281.

³ Columbus Base Ball Club v. Reiley, 25 W. L. B. 388; Rogers Manuf'g Co. v. Rogers, 56 Conn. 356; Cort v. Lazard, 18 Oreg. 221; Carter v. Ferguson, 12 N. Y. S. 580.

⁴ Lacey v. Heuck, 12 W. L. B. 209.

⁵ Bryan v. Chyne, 22 W. L. B. 165.

⁶ Young v. Spangler, 2 O. C. G. 549.

⁷ Johnson v. Railway Co., 10 W. L. B. 345.

⁸ Coe v. Railroad Co., 19 O. S. 412.

⁹ Wirth v. Tel. Co., 7 O. C. G. 290; Railroad Co. v. Tel. Co., 38 O. S. 24.

¹⁰ Bank v. Debolt, 1 O. S. 591.

¹¹ Law v. Haley, 17 W. L. B. 243.

¹² Crighto v. Dahmer, 70 Minn. —; s. c., 21 L. R. A. 84, and note.

* Fisher v. Hotel Co., 4 O. N. P.

Sec. 682. Pleading and practice.—That courts of equity exercise jurisdiction of cases of purpresture and nuisances, and of encroachments upon the public rights, as upon highways, rivers, and streets of towns, is well settled. It is predicated upon the ground of preventing irreparable injury, interminable litigation, multiplicity of suits and the protection of rights.¹ It is well settled that the remedy by injunction cannot be invoked when there is one at law, but the remedy at law must be plain, adequate and complete; it should be as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.² On the other hand, to entitle a plaintiff to an injunction, his right must be clear, the apprehended injury irreparable, its breach perilous.³ Where it is asked upon the ground of apprehended injury to real property, facts should be set forth showing that the injury is irreparable; the mere statement that it is irreparable is not sufficient.⁴ There must be an injury to property, actual or prospective, an evasion of property or of civil rights, or an irreparable injury of such a peculiar nature that it cannot be remedied at law.⁵ Where the same question has been presented to a court upon application for an injunction, another court of co-ordinate jurisdiction may refuse to hear the application until decision is rendered in the first case.⁶ After trial and judgment, upon demurrer or otherwise, an objection cannot be made to an action for injunction on the ground that an adequate remedy at law existed.⁷

Under general allegations, evidence may be received to aid the court in determining whether or not a judgment should be enjoined.⁸ An injunction cannot be allowed upon the petition alone, unless the same be sworn to positively.⁹ Where

¹ Putman v. Valentine, 5 O. 187; ⁵ People v. World's Fair Columbian Wood on Nuisances, secs. 77, 777; Exposition, 84 W. L. B. 7 (U. S. Ct. of Appeals).
State v. Railroad Co., 36 O. S. 434.

² Boyce v. Grundy, 8 Peters, 210.

³ Robbins v. Board, 2 O. C. C. 23;

Fellows v. Walker, 21 W. L. B. 390;

Walker v. Railroad Co., 8 O. 38. See

Putman v. Valentine, 5 O. 187;

Spangler v. Cleveland, 43 O. S. 526;

Burnham v. Kempton, 44 N. H. 92.

⁴ Van Wert v. Webster, 31 O. S. 420; McKinzie v. Mathews, 59 Mo. 90.

⁶ Cincinatti v. Jackson Light Co., 26 W. L. B. 104.

⁷ Culver v. Rodgers, 33 O. S. 537;

Nicholson v. Pim, 5 O. S. 25; Russell

v. Lorena, 3 Allen, 121.

⁸ McCurdy v. Baughman, 43 O. S. 78.

⁹ Ett v. Snyder, 6 Am. Law Rec.

415; Atcheson v. Bartholow, 4 Kan.

facts are not within the knowledge of the person making the oath, it will not be sufficient to warrant the granting of an injunction. The affidavit of a person giving the information should be furnished and sworn to in positive terms; verification by an attorney which does not state that he has personal knowledge of the facts will not be sufficient.¹ Where the only relief sought to be obtained by a bill in equity is an injunction, the same should contain a specific prayer for that purpose.² Upon an appeal to the circuit court in an action for injunction, the same may be suspended for good cause until the case be heard upon its merits.³ An appeal does not lie from an interlocutory order modifying an injunction.⁴

The court may, if deemed proper that a defendant should be heard before granting an injunction, require reasonable notice to be given of the time and place of the hearing of the application, and may grant a temporary restraining order until the application can be heard.⁵ An injunction will not be granted against a party who has answered, except upon notice, although a restraining order may be granted until the decision of the application for an injunction.⁶ A bond must be given with surety, to be approved by the clerk, for such a sum as may be fixed by the court or judge allowing the order, to secure the party from the damages he may sustain if it be finally decided that the injunction ought not to have been granted,⁷ excepting in a provisional injunction by the wife to prevent the husband from disposing of or wasting property, in which case it is discretionary with the court.⁸

Where the injunction is allowed at the commencement of the action, it will be sufficient to indorse the summons "in-

124; *Levy v. Ely*, 15 How. Pr. 397. 88 Md. 864; *Primmer v. Patton*, 33 Ill. 528.
And when verified positively it becomes for purposes of injunction an affidavit. *Levy v. Ely*, *supra*; *Long v. Kasbeer*, 28 Kan. 226; *Olmsted v. Koester*, 14 Kan. 463.

¹ *Hone v. Moody*, 59 Ga. 731; 15 S. E. Rep. 947; *Manistique, etc. Co. v. Lovejoy*, 55 Mich. 189.

² *Lewiston Falls Mfg. Co. v. Franklin Co.*, 54 Me. 402; *Webb v. Ridgely*,

³ *McClung v. Coal, etc. Co.*, 7 O. C. C. 182.

⁴ *Forgy v. Railroad Co.*, 1 O. C. C. 417.

⁵ O. Code, sec. 5574.

⁶ O. Code, sec. 5575.

⁷ O. Code, sec. 5576. And additional security may be required. R. S., sec. 5582.

⁸ O. Code, sec. 5705.

junction allowed," without issuing a formal order. In many cases, however, the order may be varied from the prayer in the petition; and then it may be important to the plaintiff that the defendant fully understand the order made, in which case it will be more desirable to have a copy of the entry served with the summons. In seeking a temporary restraining order, the entry should be carefully prepared in advance, so as to show the court what is desired, but more especially to save time, a copy of which may, when deemed best, be served with the summons. Service of the summons, however, indorsed "injunction allowed," or notice of the application for an injunction, will serve the purpose of a notice of its allowance.¹ But when the injunction is allowed during the litigation, without notice, the order must be served in the same manner as a summons.² An injunction operates from the time the defendant has notice, and from the execution of the undertaking required by the application.³ Upon the hearing of an application for an injunction, each party may file and read affidavits bearing upon the merits of the controversy.⁴ An injunction or restraining order may be enforced as the act of the court, and disobedience punished as a contempt.⁵ A defendant may obtain an injunction upon an answer in the nature of a counter-claim, and shall proceed as in other cases.⁶

Sec. 683. Motion to vacate.—A party may at any time before the trial, after giving notice to the adverse party of the time and place of hearing, apply to the court in which the action is pending or a judge thereof to vacate or modify an injunction. The application may be made upon the petition and affidavit upon which the injunction was granted, or upon affidavit on the part of either party enjoined, with or without answer.⁷ Vacation of an injunction upon motion and proof does not authorize or warrant the dismissal of the petition. The case should be retained, and if another issue be shown by an

¹ O. Code, sec. 5577.

² O. Code, sec. 5578.

³ O. Code, sec. 5579; *Rainsdell v. Craighill*, 9 O. 198.

⁴ R. S., sec. 5583. Simple suggestions are sometimes valuable, so the formal parts of an affidavit used in injunction proceedings is given:

Court of —, — County — ss.

John Smith, Plaintiff, }
vs. } No. —.

James Jones, Defendant. }
The State of Ohio, — County — ss.
Philip Roe, being sworn, etc.

⁵ O. Code, sec. 5581.

⁶ O. Code, sec. 5586.

⁷ O. Code, sec. 5584. The party op-

answer, such relief should be given to the plaintiff as his petition shows him entitled to, without regard to the disposition of the motion to vacate, which must of necessity follow where the petition contains a proper cause of action.¹ A judge of the supreme court cannot grant or dissolve an injunction pending in another court.² It is entirely discretionary with the court whether or not it will grant the motion to dissolve.³ A misjoinder of parties plaintiff is not cause for dissolving an injunction.⁴

Sec. 684. Second application for injunction.—No injunction should be allowed after a motion therefor has been overruled by a court on the merits of the application; and where it has been refused by the court in which the action is brought, it should not be granted to the same applicant by a court of inferior jurisdiction or a judge thereof.⁵ A refusal, however, in one case does not prevent a person from making another application in the same case,⁶ especially where new and additional matter is presented upon the hearing of the second application.⁷ Where the first application was refused for the want of material averments, it is no obstacle to the hearing of a second application upon proper amended pleadings.⁸

Sec. 685. Petition to enjoin infringement of trade-mark.—

Plaintiff is engaged in manufacturing an article known as [*give name*], which he has sold in [*state what it is and how sold*], properly labeled with the following device and trade-mark adopted by the plaintiff in the year 18—, viz.: [*Copy label*.]

That the business of plaintiff consists in manufacturing [tobacco transplanter] and selling directly and by means of agents throughout the United States, and that by reason of the excellence of said [*name article*] thus manufactured by it, and the probity of its officers and agents, plaintiff has built up and controls a large and lucrative business in the sale of [*name article*] throughout the states of —.

That the defendant is, and has been for some time prior to the commencement of this action, acting as agent for the — Company, a foreign corporation, in the sale of tobacco transplanter, which said transplanter is in many features and

posing may also file counter-affidavits. O. Code, sec. 5585. Affidavits are competent testimony. Keys v. Williamson, 81 O. S. 561.

¹ Makemson v. Kauffman, 35 O. S. 444.

² Railway Co. v. Hurd, 17 O. S. 144. N. C. 346.

³ Minor v. Terry, 6 How. Pr. 208.

⁴ Gill v. Ferris, 82 Mo. 156.

⁵ O. Code, sec. 5580.

⁶ Glass v. Clark, 41 Ga. 544.

⁷ Blizzard v. Nosworthy, 50 Ga. 514.

⁸ Halcombe v. Commissioner, 89

respects similar to the one manufactured and sold by the plaintiff; that the territory embraced within the agency of defendant comprises [*state what*]; that the — Company is and has been a competitor of plaintiff, having its principal office at —.

That plaintiff has adopted and used the name of "Bemis" to distinguish its transplanter from other transplanters, which name had not theretofore been used by any other person as a trade-mark [*here may be stated facts showing establishment of same*]; and by reason of the facts aforesaid plaintiff acquired the exclusive right to use said name; that by reason of the excellence of said article it has acquired a great reputation and plaintiff derives great profits from the sale thereof.

That the defendant, together with the — Company and other persons, have conspired to defraud and injure plaintiff and deprive it of the market which it has, by the defendant as agent for the — Company making and seeking to make sales of transplanters manufactured by the — Company, under the name of the "New Bemis Transplanter," and by defendant representing to the trade throughout the territory covered by his said agency for said — Company, that the said transplanters manufactured by the — Company are the said Bemis transplanters manufactured by plaintiff. [*Other acts of agent and company, as to circulars, catalogues, etc., may be set out.*]

[*Prayer.*]

Sec. 686. Petition to enjoin a nuisance caused by noise.—

Plaintiff is the owner in fee-simple of the following described premises situate in the city of — county, Ohio: [*Describe premises.*]

Plaintiff has built upon said lot a residence which he now occupies and has occupied as such since the — day of —, 18—.

That on the — day of —, 18—, defendant bought the premises next to plaintiff's residence, upon which he has erected a factory for the purpose of manufacturing boilers, and has been ever since the erection of said factory, and now is, engaged in the business of manufacturing boilers.

That said defendant uses in said factory a certain machine called [*name it*], which makes such a noise that it greatly interferes with plaintiff and members of his family in his dwelling-house, by making it difficult to engage in conversation and otherwise causing great inconvenience and injury [*state any particulars*].

That on the — day of —, 18—, and repeatedly since that date, plaintiff notified defendant that the noise arising from the [*name machine*] was so great that it greatly disturbed plaintiff in his said dwelling, and asked that he endeavor in some way to prevent making said noise, but that

he wholly failed and refused so to do, and said noise still continues.

Plaintiff therefore asks that the court grant a temporary restraining order against said defendant, restraining him from using said machine and from making said noise, and that upon the final hearing of this cause he may be perpetually enjoined from so doing.

NOTE.—The burden is upon the plaintiff asking for a perpetual injunction. Spangler v. Cleveland, 43 O. S. 526.

Sec. 687. Petition to enjoin operation of a slaughter-house.—

[*Caption and formal averments as in ante, sec. 686.*]

On the — day of —, 18—, defendant purchased a lot adjoining plaintiff's residence in the city of —, Ohio, and immediately constructed a slaughter-house thereon. That defendant has, since the erection of said slaughter-house, constantly been engaged in the business of killing and butchering hogs, sheep and cattle, for the market. That defendant's said business is so offensive by reason of a stench which constantly arises from his said slaughter-house because of killing and butchering of said animals, and because of the further fact that defendant does not properly conduct said business so as to prevent said stench, that the same has become a nuisance and renders plaintiff's said dwelling-house uninhabitable.

[*Prayer.*]

Sec. 688. Petition to enjoin waste and for damages.—

Plaintiff is now and has since —, 18—, been the owner in fee-simple of the following described premises situate, etc.: [*Description.*]

On the — day of —, 18—, plaintiff leased said premises to the defendant for a term of — years, to begin on the — day of —, 18—, and end on the — day of —, 18—, by virtue of which lease said defendant took possession and now occupies said premises as tenant of this plaintiff. That on or about the — day of —, 18—, the defendant wrongfully cut down [*state the waste committed*] on said premises belonging to plaintiff, of the value of \$—, and has otherwise greatly injured said estate, to the damage of the plaintiff in the sum of \$—.

That the defendant threatens and is about to and will, unless restrained by order of this court, further injure said premises by [*state how*].

Plaintiff therefore asks for a temporary order of injunction restraining the defendant from [*state acts to be enjoined*] until the final hearing of the case, and that upon such final hearing said injunction may be made perpetual, and that the plaintiff

recover from the defendant the sum of \$——, his damages in the premises, and for such other relief as is just and equitable.

NOTE.—The interest of plaintiff must be clearly set forth. *Crockett v. Crockett*, 2 O. & 181.

Sec. 689. Petition to enjoin partner from engaging in business after dissolution of partnership contrary to agreement.—

That on the —— day of ——, 18—, plaintiff and defendant formed a partnership for the purpose of carrying on the business of [*state what*] at ——, in the city of ——, county of ——, and state of Ohio.

That said partnership continued until the —— day of ——, 18—, when it was mutually dissolved.

That by the articles of copartnership it was expressly stipulated and agreed that in case of a dissolution of the firm neither of the partners should continue to carry on business in the store occupied by the firm unless by consent of the other.

That said defendant, in violation of said agreement, has now commenced and is carrying on said business at No. ——, —— street, in said city, without the consent and against the objections of plaintiff and wholly in violation of their said agreement.

That the plaintiff has duly performed all the conditions of said agreement on his part, and is now carrying on said business at No. ——, —— street, in said city, but is greatly injured by the aforesaid wrongful acts of the defendant [*state the injury*].

That the acts committed by said defendant in violation of their said agreement aforesaid is a great, irreparable and continuing injury to plaintiff's business, and cannot be measured by damages.

Plaintiff therefore prays that the defendant and his agents may be restrained from carrying on said business at —— [*state where*], or from advertising or announcing that such is his place of business, and for such other relief as is just and equitable.

NOTE.—Changed from Thornton's Forms.

Sec. 690. Petition to enjoin judicial sale of real estate.—

Plaintiff is the owner in fee-simple of the following described real estate, to wit: [*Here describe the land.*]

That on the —— day of ——, 18—, the defendant C. D. obtained a judgment in the [*name of the court where the judgment was rendered*] against E. F. for —— dollars and costs.

That an execution has been issued on said judgment, at the instance of the said C. D., and placed in the hands of the

said G. H., who is the acting sheriff of — county, state of Ohio.

That said defendant G. H., on the — day of —, 18—, under said writ of execution, levied upon the real estate above described as the property of said E. F., and has advertised the same for sale on said execution.

That the said judgment is not, and at no time has been, a lien upon said real estate, or upon any part thereof, or upon any interest therein.

That a sale of said property under said execution would create a cloud upon the plaintiff's title thereto, and the plaintiff is and will be remediless at law to remove such cloud.

Wherefore the plaintiff prays that a temporary injunction be issued to restrain said execution sale, and enjoining and restraining said plaintiff from enforcing said judgment against said real estate, and that on final hearing said injunction be made perpetual, and for such other and further relief as shall be adjudged equitable in the premises, and for costs.

Sec. 691. Petition to enjoin sale of exempt property under execution.—

The plaintiff, for his cause of action against A. B., says: That on the — day of —, 18—, he purchased from A. B. a house and lot, No. —, in the city of —, county of —, Ohio, and on the same day made and delivered to the said A. B. a mortgage on said premises to secure a note made by plaintiff for the sum of \$—.

That the said A. B., in a proceeding to foreclose said mortgage in the court of common pleas in — county, Ohio, wherein the said A. B. was plaintiff, and this plaintiff was defendant, on the — day of —, 18—, obtained a decree against this plaintiff for the sum of \$—, and costs, to be paid within ten days from the date of the entry of said decree, and in default of such payment that this plaintiff's equity of redemption be foreclosed and said premises be sold, and that an order of sale issue therefor to the sheriff of — county, Ohio, directing him to advertise and sell said premises as upon execution.

But plaintiff further says that the said defendant A. B., without procuring an order of sale to be issued in said foreclosure proceedings, caused to be issued therein an execution directed to the sheriff of — county, Ohio, commanding him that of the goods and chattels of this plaintiff C. D., the amount of said judgment, to wit, \$—, so rendered in said proceedings aforesaid, be made. That in pursuance of said execution said sheriff has made a levy upon the property of this plaintiff, to wit, a portable saw-mill, now located and operated by plaintiff at W. in said county, and said sheriff is proceeding to sell and will sell said property unless re-

strained by order of this court from so doing. Plaintiff states that he is not the owner of a homestead and does not occupy the said premises hereinbefore described involved in said foreclosure proceedings, and is therefore entitled to claim* property of the value of \$—— in lieu of his homestead exemption, and at the time of the levy of said execution, as aforesaid, by said sheriff upon said mill property, plaintiff demanded of said officer that the same be set off to him in lieu of a homestead, which demand said sheriff refused, and he thereby failed and refused to allow this plaintiff to retain said property as exempt; and plaintiff states that the fair and reasonable value of said property is not more than the sum of \$500.

[Or, That on the —— day of ——, 18— (*prior to date of judgment and decree; or even after may have same effect*), this plaintiff abandoned said premises and ceased to occupy the same as a homestead, and thereby became entitled to claim (*continue form**)].

Said defendant so sued out said execution against this plaintiff and caused the same to be levied upon plaintiff's personal property, instead of proceeding under the order for the sale of said real estate as aforesaid, for the sole purpose of preventing this plaintiff from claiming his exemption, to which under the law he was entitled.

Wherefore plaintiff prays that a temporary order may issue restraining said defendant from proceeding under his said levy to sell said exempted property, without allowing plaintiff to claim his exemption, and that upon a final hearing of this cause said defendant prays that said injunction be made perpetual and for all proper relief.

NOTE.—Purposes of exemption laws. *Kettle v. Newcomb*, 22 N. Y. 252; *Franklin v. Coffee*, 18 Tex. 415. They are liberally construed. 104 Ind. 255; 126 Ill. 259; 44 Am. Rep. 280; 76 Am. Dec. 219; 91 Ind. 884; 46 Am. Rep. 607.

Sec. 691a. Petition to restrain strikers from interfering with business.—

Plaintiff states that it is a partnership formed for the purpose of doing business in Ohio, and is engaged in the manufacture and sale of saddles and harness; that it has a large capital invested in said business, and the successful operation thereof requires it to employ, and it does employ therein, a large number of workmen.

Plaintiff states that on the —— day of ——, 18—, many of its said employees went out on a strike, and refused and still refuse to perform their accustomed work, without any just cause therefor.

That the defendants and each of them have entered into an unlawful conspiracy among themselves and divers other persons unknown to plaintiff to embarrass and annoy plaintiff in its said business and in the conduct thereof, and to stop and

destroy the same, and to deprive it of and drive away its employees; that said defendants are actively seeking to accomplish this result, and are embarrassing and threatening its said employees and to force them to abandon their work, and to prevent them and others from remaining in and from entering plaintiff's employment, and have assaulted and beaten many of its said employees in their attempts to so prevent them from performing the duties of their said employment. That defendants are, by acts and threats of intimidation, frightening and have frightened many of its employees from remaining in its employ, as well as preventing others from entering therein, and said defendants have, by reason of their said unlawful conduct, greatly hampered and destroyed plaintiff's business, and will so destroy and ruin plaintiff's business unless restrained by order of this court.

That by reason of the unlawful conduct and acts of conspiracy of said defendants aforesaid, plaintiff is prevented from properly conducting its said business, and is unable to fill contracts undertaken by it, and unless defendants are so restrained from the commission of their said unlawful acts of conspiracy against plaintiff it will suffer great and irreparable loss and injury, which cannot be measured in damages, because said defendants are wholly irresponsible and without property and unable to respond in damages, and plaintiff is therefore without remedy at law.

Plaintiff therefore asks that the defendants and each of them be restrained from in any way harassing or interfering with plaintiff in its said business, and from harassing or threatening or frightening those persons desiring to enter the employ of plaintiff, and from assaulting them, or from inducing others to attempt to do the same; and that upon a final hearing a decree for a perpetual injunction restraining defendants from the aforesaid acts may be granted, and for such other and further equitable relief as may seem proper.

^a NOTE.—See *ante*, sec. 680, p. 631, n. 1, 2. *Perkins, C. & Co. v. Rogg*, 27 W. L. B. 32. Workmen may lawfully combine, and may by reasonable argument persuade others to quit work, but cannot do so by intimidation. Equity will protect property whether the interference therewith is connected with crime or not. *Perkins, R. & Co. v. Rogg, supra*. See *State v. Buchanan*, 5 Harr. & J. (Md.) 317; *Ray on Contractual Lim.* 378, and cases cited. Strikes are not necessarily illegal. *Farrer v. Close*, L. R. 4 Q. B. 612. Even though the acts of striking workmen may be punishable by the criminal law, yet equity will restrain them if their acts tend to the destruction of property. *Springhead Spinning Co. v. Riley*, L. R. 6 Equity Cases, 557. Injunction will lie to prevent labor unions and their members from entering upon or interfering with property. *Coeur D'Alene Con. & Mining Co. v. Miners' Union*, 25 Chic. Leg. News, 41 (U. S. Circuit Ct. Dist. Idaho).

Sec. 691b. Petition to enjoin railroad strikers.—

Plaintiff is a corporation duly incorporated and organized and existing under and by virtue of the laws of the state of —, and owns and operates a line of railway extending from

— to — [describe such part of the line of railway as may be desired], and has in — counties numerous branches, and connects with other railways in mail, express, and other business between said cities of — and —.

That plaintiff has a contract to carry promptly freight consigned to its charge as such common carrier, and to make delivery thereof to the several consignees at all stations and points named on its line within and outside of the state, and has other contracts to transport passengers, the United States mail, and express business, from and to the said several cities, villages and points upon its said railway both within and outside of said state, and does a large interstate business; that for the safe and prompt transportation and delivery of said passengers, freight and United States mail, it is essential that plaintiff should run its trains according to a schedule made and designed by plaintiff for the safety of passengers and the prompt carriage of mails and passengers according to its contract.

Plaintiff states that the defendants herein were employees of plaintiff in the capacity of yardmen, conductors, brakemen and switchmen, engaged in [state where], which yards were and have been operated by plaintiff as part of its railway; that defendants, each and every one of them, on the — day of —, 18—, went out on a strike, so called, and thereafter refused and continue to refuse to perform their accustomed labor and duties under their previous employment; that defendants, with others whom it is now impossible to name, have conspired and combined for the unlawful purpose of preventing plaintiff from moving freight cars, passenger and mail cars, and from fulfilling its said contracts with its shippers, consignees, and the United States government; and that defendants have stopped and delayed cars containing freight at the city of —, and at sundry other places on its said line of railway, and are preventing plaintiff from performing its duties as a common carrier under the laws of the state of —; that by threats and intimidations against its officers and employees, and those whom plaintiff is now employing to conduct its business and operate its trains; that defendants have already stopped almost entirely the necessary handling, switching and movement of freight cars of plaintiff in its yards at —, and the movement of freight cars and trains upon its railway, and have delayed its passenger trains, and have thereby compelled plaintiff to run them without a schedule, thereby endangering the safety of its passengers and the prompt carrying of the mails thereon.

[Or, That defendants have stopped in its said yards at — large quantities of freight of various kinds belonging to its customers and consignees, which is of a perishable nature, the value of which is materially affected by the change of market,

all of which is so stopped and delayed in said yards, and the movement thereof prevented by said defendants and each of them, to the great and irreparable loss and damage of plaintiff and its customers and the owners and consignees thereof: that such and all such delays in the handling of such freight generally brings plaintiff under great danger of claims for damages for breaches of contracts, violations of contracts with the general government and the state government and innumerable litigations concerning the same.]

Plaintiff further states that many of plaintiff's employees are ready and willing to continue their duties as such employees, and that other men stand ready and willing to enter its employment and perform the duties necessary to its business, but that defendants and each of them, by threats, intimidation and threatened forcible prevention thereof, are keeping said men from so entering the employ of plaintiff; that defendants declare and threaten that plaintiff shall not be permitted or allowed to have the benefit of the services of said men to move any freight trains or other trains whatever until plaintiff shall have agreed and bound itself to certain unreasonable, unlawful and illegal demands made by them for a certain schedule of wages and the payment of increased wages to defendants, and many illegal unreasonable conditions, requirements and demands, concerning which plaintiff and defendants have been unable to agree; that plaintiff, by reason of said unlawful threats and intimidation upon its said employees and those willing to enter its employment, is delayed, hindered and prevented from performing its duty as a common carrier and the accomplishment of its lawful business as such corporation, and is suffering great and irreparable damage and loss to its business, profits, property and duties as such common carrier by reason of the aforesaid unlawful acts, intimidation and threats of said defendants and each of them. That the consignees and shippers of freight over plaintiff's said railway are likewise suffering great and irreparable loss and damages by reason of said acts, threats, intimidations and conspiracy of said defendants and each of them, as aforesaid. *[Any other special facts or circumstances as above illustrated may be given.]*

That plaintiff is wholly without any remedy at law or otherwise unless this court will forthwith, by its restraining order and injunction, restrain and prohibit defendants and each of them from the aforesaid unlawful acts.

Plaintiff therefore prays that this honorable court do order and command defendants and each of them to keep off the premises, lands, yards and right of way of the plaintiff, and to forbid and restrain them and each of them from interfering with, from disabling or in any way rendering unfit for immediate use its engines, tenders, cars, switches, couplings,

engine-houses, water-tanks or other property of plaintiff; to forbid and restrain them and each of them from molesting, threatening or in any manner hindering any of its employees by any acts or violence or by intimidations, threats or otherwise in the full and complete possession and management of its railway, and from discharging their duties and employment under plaintiff, and from interfering with any property in the custody of plaintiffs whether belonging to it, shippers or other owners, or from interfering or otherwise injuring or inconveniencing or delaying passengers transported or about to be transported over its line of railway, or from interfering in any manner by acts of violence or threats, preventing or endeavoring to prevent the shipment of freight, or the transportation of mail of the United States, over the railway operated by plaintiff at any place whatever, and particularly at any place within the said city of —, or county of —, in the state of Ohio; that on the final hearing of this action, said defendants and each of them may be perpetually enjoined from doing any of the acts complained of as aforesaid, and for all other and further relief to which in equity it is now or hereafter shall be entitled.

NOTE.— See *ante*, sec. 680, p. 631, note 1, and cases cited.

General remarks.— This has proved to be a very effective remedy by obtaining a temporary restraining order and punishing those guilty of violating it as for contempt, which may easily be done, because in contempt proceedings in such cases a rule prevails that the merits of the order cannot be inquired into. This does not appear to be a substantial remedy when such a course is taken, because the merits of the case may never be inquired into, and it may not be intended that the same shall be inquired into. The wide scope of recent cases has been quite effective, but the precedent has not been established by a court of last resort. It is perfectly proper that all unlawful trespasses and interferences by strikers (*Railroad Co. v. Wenger*, 17 W. L. B. 306) by force and intimidation should be prevented, when a cause of action is fairly stated, and the rights of both plaintiff and strikers are properly tested. See ch. 9, sec. 83 et seq., of *Cogley on Strikes*.

CHAPTER 47.

INNKEEPERS — HOTELS.

Sec. 692. Inn defined.

693. Duties and liabilities of inn-keeper.

694. Petition against hotel-keeper for loss of guest's goods.

695. Petition against hotel proprietor for loss of watch and chain from guest's room.

Sec. 696. Petition against hotel-keeper for refusal to receive guest.

697. Answer that guest failed to comply with rules and lost property by his own negligence.

Sec. 692. Inn defined.— An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation. The distinction between a hotel or inn and a boarding-house is, that in the former the general public are invited, and in the latter there is a previous agreement for accommodation for a certain length of time.¹ An owner of an apartment hotel is not an innkeeper, and is not therefore liable to a tenant occupying a suite of rooms as is an innkeeper.²

Sec. 693. Duties and liabilities of innkeeper.— To create liability on the part of a hotel-keeper, a person who has suffered loss of property must necessarily sustain the relation of guest at the time of loss. That he may be regarded as a guest it must appear that he visited the hotel for the purpose which the common law recognized as the purpose for which inns are kept. He must require the present entertainment and accommodation of the inn, and cannot be regarded as a guest if he merely deposits money or other articles for safe-keeping.³ The person must be received as a guest and not as

¹ *Fay v. Improvement Co.*, 93 Cal. 253; s. c., 28 Pac. Rep. 943; 26 Pac. Rep. 1099. See *Moore v. Development Co.*, 26 Pac. Rep. 92; 87 Cal. 483 (1891).

² *Davis v. Gray*, 141 Mass. 531; 6 N. E. Rep. 549.

³ *Arcade Hotel Co. v. Wiatt*, 44 O. S. 32. See *Story's Bailm.*, sec. 477; *Rex v. Luellen*, 12 Mod. 445; *Queen*

an ordinary boarder.¹ The relation of guest and innkeeper does not arise where a person goes to a hotel and merely leaves his baggage by consent of the latter, and does not engage a room or eat or drink there.² The relation of boarder instead of guest does not arise by fixing the price to be paid.³ The landlord must derive some profit,⁴ and the innkeeper must have been acting as such at the time the goods whose owner becomes a guest are received.⁵ An innkeeper is under no obligation to receive goods from a person merely for deposit.⁶ All persons are entitled to full and equal enjoyment of the accommodation of inns.⁷ An innkeeper is bound to take care of goods, money and baggage of his guest, and is liable for the acts of his servants as well as other persons coming into his house as guests or otherwise;⁸ and is *prima facie* liable for loss or injury to the goods of his guests which is not occasioned by the act of God, public enemy or fault of the guest. It is not, therefore, necessary in an action for the loss of goods to allege any carelessness on the part of the innkeeper.⁹

But the common-law liability of innkeepers has been modified by statute. If an innkeeper has a suitable safe or vault for the purpose of safely keeping articles which a guest may desire to leave, and posts notice to that effect in the office or on the inside of the door of sleeping-rooms, he will not be liable for the loss of any article suffered by a guest, unless the

v. Rymer, L. R. 2 Q. B. D. 186; Walling v. Potter, 35 Conn. 183; Healy v. Gray, 68 Me. 489; Lusk v. Belote, 22 Minn. 468.

¹ Singer Mfg. Co. v. Miller, 55 N. W. Rep. 56 (Minn., 1893).

² Toub v. Schmidt, 60 Hun. 409.

³ Hancock v. Rand, 94 N. Y. 1; 46 Am. Rep. 112; Mowers v. Fethers, 61 N. Y. 84; 19 Am. Rep. 244.

⁴ Wharton on Innkeepers, p. 70; Lynar v. Massop, 36 Q. B. Up. Can. 330.

⁵ Carter v. Hobbs, 12 Mich. 52.

⁶ Wharton on Innkeepers, p. 76; Mattee v. Brown, 1 Cal. 221.

⁷ R. S., sec. 7913—69. A resident may become a guest. Walling v.

Potter, 35 Conn. 183; Hall v. Pike, 100 Mass. 495. The relation of guest and innkeeper is terminated when the former pays his bill and leaves the hotel. O'Brien v. Vaill, 22 Fla. 627. And if he checks his baggage for safe-keeping after payment of his bill and the same is lost, there is no liability on the part of the innkeeper. Glenn v. Jackson, 93 Ala. 342; 9 So. Rep. 259 (1891).

⁸ Prescott v. Bruce, 2 C. S. C. R. 53.

⁹ *Bowell v. De Wald*, 2 Ind. App. 803; 28 N. E. Rep. 430. The failure of the guest to inform the innkeeper or his servant that his valise contains valuables does not constitute negligence. *Id.*

guest has offered to deliver the property to the innkeeper for custody and the innkeeper has refused or omitted to take it and deposit it for safe-keeping; but an innkeeper is not relieved from liability for a loss caused by theft or negligence of himself or any of his servants.¹ A hotel-keeper who has complied with the statute, in the absence of negligence is not liable where the guest retains valuables in his possession.² It is immaterial whether the guest owns the money himself, or whether he holds the same in trust, as he is nevertheless the proper person to bring the action against the hotel-keeper for its loss;³ a party entering into a contract, whether as agent or principal, may sue in his own name.⁴ And in an action against an innkeeper by a guest for loss of goods, it is not necessary to aver demand or negligence,⁵ and it will be sufficient to show his liability, to state that plaintiff was entertained by him as a guest.⁶ An innkeeper may also be liable for personal injury caused through his negligence in maintaining his premises in a condition of reasonable safety to the guest.⁷ And an allegation in such action by a guest that the hotel-keeper had failed to light a hallway, and that the stairway was not guarded by an inclosure or otherwise, although not stating that it was negligence, has been held sufficient.⁸ A boarding-house keeper is liable for the loss of goods of a boarder only when he has failed to exercise ordinary care to prevent the loss.⁹

¹ R. S., sec. 4427. The statute does not apply to goods not mentioned in it. *Fuller v. Coates*, 18 O. S. 848.

² *Lang v. Arcade Hotel Co.*, 12 W. L. B. 250; *Fuller v. Coates*, *supra*.

³ *Arcade Hotel Co. v. Wiatt*, 1 O. C. C. 55; R. S., sec. 4995.

⁴ *Davis v. Harness*, 38 O. S. 397; *Guard v. Neff*, 39 O. S. 607.

⁵ *Willard v. Reinhardt*, 2 E. D. Smith, 148.

⁶ *Prescott v. Bruce*, 2 C. S. C. R. 58.

⁷ *Railroad Co. v. Thompson*, 77 Ala. 448; *Railroad Co. v. Arnold*, 80 Ala. 600.

⁸ *West v. Thomas*, 11 So. Rep. 768 (Ala., 1892). As to personal injuries,

see *Sneed v. Morehead*, 70 Miss. 690; 18 So. Rep. 235.

⁹ *Siegmán v. Keeler*, 24 N. Y. S. 821.

The court in this case makes a most excellent review of the question. A boarding-house keeper is under no obligation to keep a boarder's room locked in his absence. *Id.* A boarder is not a guest in the sense in which it is applied with reference to an innkeeper's liability (*Hancock v. Rand*, 94 N. Y. 1); and unlike the latter, who is liable as an insurer of his patron's goods (*Hulett v. Swift*, 33 N. Y. 571), a boarding-house keeper is answerable for a loss of the goods only if he has omitted to exercise ordinary care

Sec. 694. Petition against hotel-keeper for loss of guest's goods.—

Plaintiff says that the defendant is a corporation organized under the laws of Ohio for the purpose of operating and conducting the business of an innkeeper, and was on the — day of —, 18—, and is at the present time, operating The Hotel Emery, at —, Ohio, for the accommodation and entertainment of the general traveling public.

That on the said — day of —, 18—, the plaintiff was received by the defendant as a guest at its hotel, and placed his trunk and baggage in the care and custody of said defendant.

*That while said plaintiff was so remaining at said hotel as its guest, his said trunk, with its contents, was taken and carried away from said inn without plaintiff's knowledge or consent [and without his fault or neglect], by some person to him unknown, whereby the same is lost, to the plaintiff's damage in the sum of \$—, for which he asks judgment, etc.

[*Or, for money deposited which is stolen, from *.*] There is due plaintiff from said defendant the sum of \$—, which he deposited with said defendant on the — day of —, 18—, while a guest at said hotel, for safe-keeping in its safe, in accordance with its rules and regulations in that behalf, which

to prevent it. *Barber v. Harrison*, 6 City H. Rec. 89; *Smith v. Read*, 6 Daly, 83; *Cooley*, Torts, p. 761. Ordinary care in the case of a boarding-house keeper may properly include the exercise of a reasonable degree of discrimination in the admission and maintenance of persons as patrons of his establishment. A boarding-house keeper, furthermore, is, in the absence of an agreement to the contrary, in contemplation of law a custodian of his patron's goods. *Ingalsbee v. Wood*, 36 Barb. 452; *Smith v. Read*, *supra*. The former thus becomes a bailee of the latter's goods. *Story*, Bailm. (9th ed.), § 28; *Coggs v. Bernard*, 1 Smith's Lead. Cas. (Amer. ed., Hare & Wallace's Notes), p. 382; 4 Lawson, Rights, Rem. & Pr., § 1698 et seq. If, upon proper demand by the bailor, the goods are not restored by the bailee, and no sufficient excuse therefor is offered

by the latter, he may be deemed to have converted the same to his own use, and mulcted in damages accordingly; but if it be shown that the goods have been lost, destroyed or stolen, he is not answerable for their value, unless it further appears that with due care on the part of the bailee the loss, destruction or theft would have been averted. *Claffin v. Meyer*, 75 N. Y. 260; *Leoncini v. Post* (Com. Pl. N. Y.), 18 N. Y. Supp. 825. The burden of proof in such a case is, as in other instances of imputed negligence, upon him who asserts the want of due care (*Claffin v. Meyer*, *Leoncini v. Post*, *supra*), the presumption always being that a person has performed a duty required of him. *Bailey*, Onus Prob. 216; *Cosulich v. Oil Co.*, 123 N. Y. 118; 25 N. E. Rep. 259; *Turner v. Kouwenhoven*, 100 N. Y. 115, 121; 2 N. E. Rep. 637.

said sum of money plaintiff has demanded from said defendant, but which it wholly refuses to pay.

[*Prayer.*]

NOTE.—Hotel-keeper is not liable under the statute for loss of goods, when it posts up the proper notices that it has a place for the safe-keeping of articles of its guests, unless the guest has offered to deliver the property and the hotel-keeper has neglected or refused to deposit the same. R. S., sec. 4427. The hotel-keeper is not excused if property intrusted to his care has been stolen. *Gast v. Gooding*, 7 W. L. J. 234.

Sec. 695. Petition against hotel proprietor for loss of watch and chain from guest's room.—

[*Caption.*]

Plaintiff says that the defendants were, on the — day of —, 18—, the proprietors of the Merchants' Hotel in the city of C., and, as innkeepers, lodged and entertained the plaintiff as a guest for compensation, from the said — day of —, 18—, to the — day of —, 18—; that while this plaintiff was being so entertained as a guest by said defendants, at an early hour of the morning on the — day of —, 18—, while he was in bed in his room in said hotel, having therein a gold watch and chain of the value of \$—, the door of his room being locked, he unlocked the same at the call of one of defendant's servants to enable said servant to make a fire in his said room; that a few minutes thereafter the door of his said room was opened from the outside, the room entered, and his said watch and chain were stolen and entirely lost to him without his fault and to his damage in the sum of \$—, for which sum he asks judgment against said defendants.

NOTE.—The petition must allege that the defendant is an innkeeper, and that the plaintiff was his guest. *Hill v. Owen*, 5 Blackf. 323; *Laird v. Eichold*, 10 Ind. 212; *Thickstun v. Howard*, 8 Blackf. 536. It is a sufficient allegation, however, to state that the plaintiff as a guest was entertained by the defendants as innkeepers. *Prescott v. Bruce & Co.*, 2 C. S. C. R. 58; *Pett v. McGraw*, 25 Wend. 658. Watch and chain are part of traveler's baggage. *Id.*; *Jones v. Voorhees*, 10 O. 145. A guest is bound only to ordinary care. *Ashill v. Wright*, 6 El. & Bl. 890.

Sec. 696. Petition against hotel-keeper for refusal to receive guest.—

[*Caption.*]

Plaintiff says that the defendant is a partnership organized for the purpose of doing business in Ohio, and is the proprietor and keeper of a hotel in the city of C., county of —, and state of Ohio, for the accommodation of the general traveling public. [*If defendant be an individual hotel-keeper the above can be changed to meet the facts.*]

That the plaintiff, on the — day of —, 18—, applied to said defendant for admission as a guest and was received into said hotel, and then and there requested the defendant to permit the plaintiff to stay and lodge at said hotel during

the night of the same day, and the plaintiff then offered to pay the defendant a reasonable sum of money for such lodging.

That the defendant had sufficient room in said hotel to accommodate plaintiff, but refused to permit him to stay or lodge therein during the time aforesaid, whereby he was compelled to leave said hotel and was put to great inconvenience, trouble and humiliation in the night time to procure accommodation elsewhere, and was injured and damaged in the sum of \$—, for which he asks judgment.

Sec. 697. Answer that guest failed to comply with rules and lost property by his own negligence.—

[Caption and formal averments.]

That it had prepared a place in its office for the deposit of overcoats and other articles of personal apparel not left in the rooms as baggage, and kept there a person to receive such articles and to give to the owner a check therefor, and required guests to so deposit such articles; of all which the plaintiff had notice; that the plaintiff neglected and omitted to leave his overcoat with its contents in the custody of defendants, but carelessly and negligently hung the same up in the open hall of the inn without any notice to the defendants, and without any knowledge on their part that he had so negligently exposed the same; and that while so carelessly exposed by the plaintiff, said overcoat was, without the knowledge or fault of the defendants, stolen, as they suppose. And so the defendant says that said overcoat was lost through and by reason of carelessness and negligence of the plaintiff, and that the negligence of the plaintiff contributed to the loss thereof.

Wherefore defendant asks that it may go hence without day.

NOTE.— If the loss did not occur through neglect of the defendant it is a matter of defense. *Baker v. Dessauer*, 49 Ind. 28. The innkeeper is not liable for the loss if it occurs by reason of the non-observance of the hotel rules by the guest, nor where the guest takes his property into his own personal care. *Fuller v. Coates*, 18 O. S. 343.

CHAPTER 48.

INSURANCE—FIRE.

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| <p>Sec. 698. Insurance, fire—Pleading conditions.</p> <p>699. The petition.</p> <p>700. Same continued—Insurable interest, how averred.</p> <p>701. Petition on policy alleging compliance with R. S., sec. 3643, requiring building to be examined by agent of insurer, etc., and for total loss.</p> <p>702. Petition on fire insurance policy—Ordinary form.</p> <p>703. Joint petition by assignee of mortgage and purchaser of insured property, averring indorsement of loss payable to petitioners by agent.</p> <p>704. Petition by mortgagee building association for loss of property mortgaged.</p> <p>705. Petition where conditions of policy as to proofs were not complied with on account of statements of adjuster.</p> <p>706. Petition on policy asking for equitable relief against mistake by inserting wrong name of insured, and for recovery thereon.</p> <p>707. Petition for reformation of amount of policy and for judgment for the amount.</p> | <p>Sec. 708. Petition by trustees of fraternal society for loss upon property, including improvements on real estate held under lease.</p> <p>709. Fire insurance—The answer.</p> <p>710. Answer averring breach of conditions.</p> <p>711. Answer setting up fraudulent representations and concealment as to circumstances by insured.</p> <p>712. Answer that policy is invalidated by reason of sale of property insured, and judgment against same.</p> <p>713. Answer that mortgagee has ample security in real estate, and that policy became void because of breach of condition as to premises becoming vacant.</p> <p>714. Answer claiming fraudulent concealment of interest of assured and false representations as to occupancy of premises, and breach of provision as to notice of loss.</p> <p>715. Answer by assignee of policy held as collateral security.</p> <p>716. Reply by insured that breach of conditions was waived by company.</p> |
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Sec. 698. Insurance, fire—Pleading conditions.—As a policy of insurance is made up largely of conditions, either pre-

cedent or subsequent, its validity must depend upon the strict performance of those conditions. As a natural consequence, therefore, in setting forth a cause of action upon a policy, the performance of the conditions should be averred. Where performance is a condition precedent to the liability of the company, the plaintiff must either allege performance, readiness to perform or a cause for non-performance.¹ If it be provided that proof of loss shall be made to the insurer within a certain time thereafter, the petition must allege either performance by the insured or waiver by the insurer.² A waiver by one party to an agreement of the performance of a stipulation in his favor is not a performance of that stipulation by another. It is a cause for non-performance and should be averred.³ But a general allegation that the plaintiff has performed all the conditions on his part to be performed is sufficient under the code,⁴ which provides that, in pleading performance of conditions precedent in a contract, it is sufficient to state that the party duly performed all the conditions on his part; and if controverted, the party pleading must show performance.⁵ But where there are unusual conditions the same should be set forth in the pleading.⁶ It has been held, however, that where the petition is defective in not averring performance of conditions precedent, it will be cured by averments in the answer that the same has been performed by the plaintiff, followed by averments in the reply.⁷ It is only those conditions precedent, or affirmative acts which are necessary in order to perfect a right of action, such as giving notice and making proofs of loss and other acts of like nature, which plaintiff is required to plead. Conditions which provide that the policy shall become void, or inoperative, upon the happening of some event, are matters of defense, and to be available must be pleaded, and their breach alleged.* A waiver of the filing of proofs within the time stipulated is sufficiently set forth by stating that the defendant waived the filing thereof within the time stipulated and thereby prevented plaintiff from performing the conditions of the policy.⁸

A stipulation in a policy that a suit must be brought within

¹ Hagood v. Shaw, 105 Mass. 276; ⁵ O. Code, sec. 5091. See *ante*, sec. 59.
Palmer v. Sawyer, 114 Mass. 18; ⁶ Insurance Co. v. Carson, 17 W.
Carpenter v. Halcomb, 105 Mass. 380. L. B. 858.

See *ante*, sec. 59.

⁷ Dayton Ins. Co. v. Kelly, 24 O. S.

² Home Ins. Co. v. Lindsey, 26 O. S. 345; 8 O. S. 293.

³ Union Ins. Co. v. Kukral, 7 O. C. C. 357. A waiver may be made for the time fixed by the policy. *Id.*;

⁴ Palmer v. Sawyer, 114 Mass. 18.

⁵ Union Ins. Co. v. McGookey, 38 O. S. 555; Crawford v. Satterfield, 27 O. S. 421.

⁸ Moody v. Ins. Co., 52 O. S. 12.

a certain time cannot be available to a company where the insured brought an action within the time, but by mistake in the summons the company was not brought into court, where it voluntarily appeared and moved to strike the petition from the files, and the writ was afterwards amended.¹ A violation of a condition that the insured property shall not be alienated or incumbered without consent of the insurer will avoid the policy, although it be provided that the consent of the company will be given upon request.² But a policy issued to a mercantile partnership containing no such stipulation cannot be avoided by a sale by one partner to his copartner.³ Even where the policy contains such restrictions, a sale by one partner to another who continues the business does not avoid it;⁴ the remaining partner, being the real party in interest, should bring the suit, and is entitled to recover the whole loss.⁵ And where a person takes a partner in the business it is not considered such a sale or transfer as will avoid the policy.⁶ To work a forfeiture under such a condition the entire interest of the insured must be sold or transferred.⁷ An assignee of a policy assigned with the company's consent, and in violation of the terms of the policy, cannot recover thereon.⁸ So where a person takes a partner, and the premises are destroyed after the formation of the partnership, and the policy has not yet been transferred, recovery may be had in the name of the insured.⁹ Where an action is brought on a policy, the conditions of which were that the insurer might rebuild or replace the property, it is unnecessary to aver in the petition that the insurer refuses to so rebuild or replace the property destroyed.¹⁰ If false statements have been made in an application for insurance, it is not necessary in an action thereon

¹ *Burton v. Insurance Co.*, 26 O. S. 487; *Minerick v. Insurance Co.*, 1 Clev. Rep. 134.

² *Home Ins. Co. v. Lindsey*, 26 O. S. 348.

³ *West v. Citizens' Ins. Co.*, 27 O. S. 1.

⁴ *West v. Citizens' Ins. Co.*, *supra*.

⁵ *West v. Insurance Co.*, *supra*.

⁶ *Blackwell v. Insurance Co.*, 48 O. S. 533. There is some conflict among the authorities. See cases cited in the opinion. The conflict

arises from the difference in the language of the policy.

⁷ *Blackwell v. Insurance Co.*, *supra*.

⁸ *West v. Insurance Co.*, 27 O. S. 1;

Dix v. Insurance Co., 23 Ill. 377;

Hartford Ins. Co. v. Ross, 23 Ind. 179;

Cowan v. State, 40 Iowa, 551.

⁹ *Blackwell v. Insurance Co.*, 48 O. S. 533.

¹⁰ *Union Ins. Co. v. McGookey*, 33 O. S. 555; *Howard, et al. Ins. Co. v. Cornick*, 24 Ill. 455.

to set forth the application and aver the truth of representations therein, as the falsity of such representations is matter of defense.¹ If a policy of insurance on a store-house and stock of goods therein contains a condition that it shall be void if the premises insured stand on ground not owned in fee-simple by the insured, unless by consent of the company, an action thereon for the loss of goods will not be defeated by a breach of condition as to title of land, as the contract is held to be severable.²

Sec. 699. The petition.—A good cause of action on a policy of insurance may be shown without setting forth the survey or application.³ Where a policy of fire insurance contains a provision that the loss, if any, shall be paid to one other than the insured, it is insufficient in an action thereon by the *beneficiary* to allege and prove that he has complied with the terms thereof, and suffered loss, but it should be averred and proved that the *insured* has complied with the terms and suffered loss.⁴ Where a petition alleges and relies on a complete performance of a contract, and a reply sets up a failure to perform as to time, and new matter as a cause of such failure, it will be such a departure as constitutes a variance.⁵ Where the date of agreement to insure and the formal execution and delivery of a policy are different, the latter relates back and takes effect as of the date of the agreement to insure.⁶ The same rule as to attaching a copy of instruments heretofore stated⁷ applies to actions upon insurance. When a loss occurs the policy becomes an evidence of indebtedness, and a copy must therefore be attached to, but

¹ Insurance Co. v. McGookey, 83 O. S. 555. See Insurance Co. v. Hogan, 80 Ill. 85.

² Coleman v. Insurance Co., 49 O. S. 810; Insurance Co. v. Spankneble, 53 Ill. 58; Insurance Co. v. Walsh, 54 Ill. 464; Koontz v. Insurance Co., 42 Mo. 126; Merrill v. Insurance Co., 78 N. Y. 452; Schuster v. Insurance Co., 102 N. Y. 260. *Contra*, Barnes v. Insurance Co., 51 Mo. 110; Havens v. Insurance Co., 111 Ind. 90; Cuthbert v. Insurance Co., 96 N. C. 480; Bank v. Insurance Co., 57 Conn. 885.

³ Insurance Co. v. McGookey, 83 O. S. 560; Insurance Co. v. Hogan, 80 Ill. 85; Insurance Co. v. Carpenter, 4 Wis. 200; Harman v. Insurance Co., 28 Ill. 235.

⁴ Western Ins. Co. v. Carson, 17 W. L. B. 357.

⁵ Bennett v. Insurance Co., 27 W. L. B. 15, 17; Trainer v. Worman, 34 Minn. 237. See also Miller v. Insurance Assoc., 47 N. J. L. 898.

⁶ Bennett v. Insurance Co., 27 W. L. B. 15.

⁷ *Ante*, sec. 57.

not made a part of, the petition.¹ Where, however, a copy of the policy has been attached to a petition which has not been objected to by motion, it will not be error for the reviewing court to treat it as part of the petition.²

Sec. 700. Same continued — Insurable interest, how averred.—The first essential averment in an action on a policy of insurance is an insurable interest in the plaintiff.³ It is said that the petition should allege ownership of the premises at the time of insurance and of the loss;⁴ while other courts hold that under an allegation setting forth the subject-matter of insurance and the nature of the risk, without specifying the nature or extent of the interest of the insured, insurable interest may be shown.⁵ And so where plaintiff alleges that, being the owner of a stock of goods, was insured by the defendant against loss by fire to it, sufficiently alleges ownership in the property at the time of the loss.* And an insurable interest is sufficiently shown where it is alleged that the insurance company, for a specified premium, executed and delivered a policy of insurance on specific property occupied by plaintiff.⁶ A landlord has an insurable interest in permanent improvements added to his building by a tenant.⁷ But a tenant who has made a verbal agreement with his landlord to keep the premises insured has such an insurable interest therein that he may take it in his own name.⁸ The test of insurable interest is whether an injury to the property, or its destruction by the peril insured against, will cause any pecuniary loss to the insured.⁹ The petition should identify by description the prop-

¹ See *ante*, sec. 57.

² *Byers v. Insurance Co.*, 85 O. S. 606.

³ *Freeman v. Insurance Co.*, 38 Barb. 247.

⁴ *Phoenix Ins. Co. v. Bentu*, 87 Ind. 182.

⁵ *Insurance Co. v. Harmer*, 2 O. S. 458; *Fletcher v. Insurance Co.*, 18 Pick. 419; *Tyler v. Insurance Co.*, 12 Wend. 507; *Strong v. Insurance Co.*, 10 Pick. 40. See *Insurance Co. v. McGookey*, 33 O. S. 561.

⁶ *People's Ins. Co. v. Heart*, 24 O. S. 331, 332.

⁷ *Western Ins. Co. v. Carson*, 17 W. L. B. 357.

⁸ *Queen Ins. Co. v. Leonard*, 9 O. C. C. 46.

⁹ *Berry v. Insurance Co.*, 132 N. Y.

49; *Lawrence v. Insurance Co.*, 43 Barb. 479.

¹⁰ Wood on Fire Ins., sec. 232. A common carrier may insure goods intrusted to it. *Crowley v. Cohen*, 18 B. & A. 478; *London, etc. Ry. v. Glyn*, 1 El. & El. 652. So may a warehouseman. *Stilwell v. Staples*, 19 N. Y. 401; *Pelzer Manufg. Co. v. Sun Fire Office*, 15 S. E. Rep. 562. An administrator of an insolvent estate has an insurable interest in buildings. *Herkimer v. Rice*, 27 N. Y. 168. Agents, commission merchants and others having custody of property may insure in their own names. *Waring v. Insurance Co.*, 45 N. Y. 606. A husband has an in-

erty burned with that insured, and should show insurable interest in the plaintiff at the time of loss.¹

Sec. 701. Petition on policy alleging compliance with Revised Statutes, section 3643, requiring building to be examined by agent of insurer, etc., and for total loss.—

The plaintiff says the defendant is a corporation duly organized under the laws of the state of New York to do and transact the business of insurance against loss by fire, and represented by agents only, in said — county, Ohio.

That on the — day of —, 18—, said plaintiff was, and ever since has been, the owner of a two-story brick store building, with basement, tin roof and brick cornice, situated on the northwest corner of E. and S. streets, in the village of W., — county, Ohio.

That on the day aforesaid, in consideration of the premium of — dollars paid, defendant by its policy of insurance (a copy of which is hereto attached, marked "Exhibit A"), insured plaintiff against loss or damage by fire to the amount of — dollars on said property, from the — day of —, 18—, at 12 o'clock, noon, until the — day of —, 18—, at 12 o'clock, noon.

That said defendant has received the premium upon the full amount mentioned in said policy, to wit: — hundred dollars. That said insurance company, before insuring said buildings as aforesaid, caused the same to be examined by the agent of said insurer, to wit, one S. W. S., and a full description thereof to be made and the insurable value thereof to be fixed by said agent. That no change has been made increasing said risk without the consent of said insurer, and that there has been no fraud, intentional or constructive, on the part of the insured.

Plaintiff further says that on the — day of —, 18—, all of said buildings were totally destroyed by fire. That plaintiff immediately thereafter, to wit, on the — day of —, 18—, more than sixty days prior to this action, gave defendant due notice and proof of said fire and loss; that the defendant at that time, by its agent duly authorized, and on the premises where said fire occurred, entered upon an adjustment of said loss—had the same estimated and damage thereof appraised—and thereby waived further notice and proof of said loss. That plaintiff has been at all times ready and willing to enter

insurable interest in a homestead of Appleton Iron Co. v. Assurance Co.,
which his wife holds title. Merrett v. 46 Wis. 23.
Insurance Co., 42 Ia. 13. See Glaze ¹Ætna Ins. Co. v. Black, 80 Ind.
v. Insurance Co., 87 Mich. 349. Both 513; Ætna Ins. Co. v. Kittles, 81 Ind.
mortgagor and mortgagee of chattels 96; Home Ins. Co. v. Duke, 75 Ind.
have an insurable interest therein. 535.

into an arbitration, as provided in said policy, but has been unable to do so through the fault of defendant. That plaintiff has duly performed all the other conditions of said policy on his part to be performed, and no part of said loss has been paid.

Wherefore plaintiff asks judgment against said defendant in the sum of — dollars with interest thereon from the — day of —, 18—. J. B., Attorney for Plaintiff.

NOTE.— From *Phoenix Ins. Co. v. Kennedy*, error to circuit court of Lake county, No. 1902. Demurrer to petition overruled and affirmed by circuit and supreme courts, 37 W. L. B. 847. Revised Statutes, section 3643, requires all companies insuring buildings to cause the same to be examined by an agent of such insurer, and a full description made. The neglect or omission of a company's agent to make the examination and fix the value according to statute will not prevent application of statute to a policy issued by the company, or defeat or affect the operation of the statute. *Insurance Co. v. Leslie*, 47 O. S. 409.

Sec. 702. Petition on fire insurance policy — Ordinary form.—

[*Caption and averment of corporate capacity.*]

That the said defendant, in consideration of a certain premium, by and between the said plaintiff and defendant agreed upon and by the said plaintiff then paid, to wit, the sum of \$—, on the — day of —, 18—, at O., Ohio, did by a certain policy of insurance of that date, duly executed, insure the said plaintiff against loss or damage by fire to the amount of \$—, for the period of — years from the — day of —, 18—, at — o'clock — M., to the — day of —, 18—, at — o'clock — M., upon the property specified, described and located as follows: [*Description of property.*]

And said company, in and by said policy of insurance, which was in writing, agreed to indemnify and make good unto his plaintiff, or to his legal representatives, all such loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of plaintiff in said property, as should happen by fire to the property above described; the amount of loss or damage to be estimated according to the actual value of the property at the time of the loss, making due allowance for depreciation from location, use or otherwise, and to be paid sixty days after the loss shall have been ascertained, in accordance with the terms and conditions of said policy, and proof of the same satisfactory to said defendant should have been made by plaintiff and received at the office of said defendant.

It was mutually understood and agreed in said policy by and between plaintiff and defendant that said policy was made and accepted with reference to the terms and conditions therein set forth, and the conditions as to procedure in case of loss annexed to said policy, which conditions were by said

policy declared to be a part of the same and were to be used and resorted to in order to determine the rights and obligations of the parties to said policy in all cases not otherwise specially provided for in writing, and that no condition, stipulation, covenant or clause contained in said policy should be altered, annulled or waived, or any clause added to said policy, except by writing, indorsed thereon or annexed thereto by the president or secretary or duly commissioned agent of said company. The terms and conditions set forth in said policy are in the words and figures following, to wit: [*Set them forth.*]

That said policy is by said defendant numbered — (and attached hereto as an exhibit). And the said plaintiff further saith that, at the time of the date of said policy of insurance, the said plaintiff was the owner of all property mentioned in said policy and so continued from thence up and until the time of the loss hereinafter mentioned. Plaintiff further says that he has duly kept, observed and performed all the requirements and conditions contained in said policy and annexed thereto and on the back and sides thereof and in all the fine print and coarse print stamped or impressed upon said policy, by him, the said plaintiff, to be kept, observed and performed in that behalf; and the plaintiff further avers that afterward, on the — day of —, 18—, the said [*description of property and statement of loss*].

Plaintiff says that on said — day of —, 18—, he immediately gave notice of said loss in writing to defendant, and on the — day of —, 18—, plaintiff did render to defendant a particular statement of the loss, signed and sworn to by plaintiff, stating all the knowledge and information which plaintiff had or was able to obtain as to the origin and circumstances of the fire, and also stating the title and interest of plaintiff and of all others in the property, the cash value thereof, the amount of loss and damage, all other insurance covering any of said property, and a copy of the written parts of all policies and occupation of the entire premises.

Plaintiff says that defendant waived the filing of said statement within fifteen days and prevented plaintiff from complying with that provision of the policy. Plaintiff says that on the — day of —, 18—, he, in writing, requested said defendant to submit the question as to the amount of loss and damage, and all other questions that might arise under said policy, except the validity of the contract or the liability of said company, to competent and impartial persons, pursuant to H 2d of the fine-print conditions on the top of the back part of said policy, but said defendant utterly refused thus or in any other manner to submit said matter to arbitration. Plaintiff further says that said statement and proofs of loss so furnished by this plaintiff as aforesaid to said defendant

have never, by said defendant, been objected to; and plaintiff says that said proofs of loss so by this plaintiff furnished as aforesaid were satisfactory to said defendant; that defendant received said proofs of loss on said — day of —, 18—, at the office of said company, and — days from said time and from the time of ascertaining the loss, in accordance with the terms and conditions of said policy, have long since elapsed; yet the said defendant, although the said plaintiff has performed all and singular the requirements and conditions by said policy and the schedule and fine print on the back thereof and thereto attached required to be done and performed by the said plaintiff, to entitle him to the payment of said amount of loss so sustained by said plaintiff, and render the said defendant liable to pay the same, not regarding its duty in the premises, did not nor would not pay the said sum of \$—, nor any part thereof, to the said plaintiff, but hitherto and still refuses so to do, to the damage of said plaintiff in the sum of \$—. Wherefore the said plaintiff prays judgment against the said defendant for the said sum of \$—, with interest thereon from —, 18—, his damages as aforesaid sustained.

NOTE.— From *United Firemen's Ins. Co. v. Kukral*, error to C. C. Cuyahoga Co., No. 1699, 27 W. L. B. 311.

Termination of a contract of insurance: Insured may require policy to be canceled. R. S., sec. 3664. Parties to a contract of insurance may agree upon terms and conditions upon which it may be canceled. *Insurance Co. v. Brecheisen*, 30 W. L. B. 303; 50 O. S. 542.

Construction: Exceptions in a policy should be strictly construed. *West v. Insurance Co.*, 27 O. S. 10; *May on Insurance*, sec. 174.

Damages: The measure of damages for loss of property is the actual cash value at the time of the loss. *Mitchell v. St. Paul, etc. Ins. Co.*, 53 N. W. Rep. 1017; 28 W. L. B. 158; *Chippewa Lumber Co. v. Insurance Co.*, 44 N. W. Rep. 1055.

Insurance money collected after the death of the owner of the property is distributed as real estate, and widow is entitled to dower. *Fleming v. Jordan*, 28 W. L. B. 332.

Sec. 703. Joint petition by assignee of mortgage and purchaser of insured property, averring indorsement of loss payable to petitioners by agent.—

That on the — day of —, 18—, one A. C. was the owner of a certain barn and the contents therein, consisting of hay, grain, fodder and seed, and also was owner of certain farming implements, etc., in said buildings contained. That said buildings with contents as aforesaid were situate on the following described premises, to wit: [*Description.*]

That on the — day of —, 18—, and in consideration of — dollars paid, the said defendant by their policy of insurance, a copy of which is hereto attached marked "Exhibit A," insured the said A. C. against loss or damage by fire on said buildings and contents thereof to the amount of —

dollars from the — day of —, 18—, at 12 o'clock noon, until the — day of —, 18—, noon. [*State any necessary conditions of the policy.*]

That on the — day of —, 18—, said A. C. duly executed and delivered to one W. W. and R. R. his certain mortgage on said premises to secure the payment of his two certain promissory notes of even date with said mortgage. [*Give description of notes.*]

That on the — day of —, 18—, the said R. R. for a valuable consideration duly assigned and transferred to the said plaintiff, A. R. H., all his right, title and interest in and to said note and mortgage; and that on the — day of —, 18—, the said W. W. for a valuable consideration also duly assigned and transferred to said plaintiff, A. R. H., all his right, title and interest to his said note and mortgage, and that thereby the said plaintiff H. became on said — day of —, 18—, the sole owner of said mortgage and the notes secured thereby, and that he ever since that time has been and is still the owner of the same.

That on the — day of —, 18—, said A. C. also duly executed to the said plaintiff, I. C., his certain mortgage on said premises, to secure the payment of his certain promissory note executed to the said I. C. on the — day of —, 18—, and calling for \$—, with interest from date at rate of — per cent., payable annually.

That on the — day of —, 18—, for a valuable consideration the said insured A. C. sold and transferred to the said plaintiff, C. V. C., all his right, title and interest in and to the aforesaid personal property so insured by defendant, consisting of corn, grain, hay, seed, fodder, wagons, carriages, harness and farming implements, and being the contents of said buildings insured as aforesaid.

That the said plaintiff, C. V. C., on said — day of —, 18—, became the sole owner of said personal property so insured, and ever afterwards, and on the — day of —, 18—, was still the owner of the same, when it was totally destroyed by fire as hereinafter set forth.

And plaintiffs further say that additional incumbrances by mortgage and liens, having been placed upon said premises after the issuing of said policy, and said transfer of said personal property having been made to C. V. C., the said A. C. did on the — day of —, 18—, at the request of said plaintiffs and for their benefit, take said policy of insurance to D. W. W., the duly appointed and qualified and authorized agent of the said defendant at H., Ohio, and did then and there state and fully make known to said agent of the said defendant the kind, number and amount of said additional mortgage and liens, and did fully make known to said agent that said personal property had been duly sold and transferred to said

plaintiff, C. V. C., and that said insured then and there stated to said agent that he desired to make said policy a good and valid policy if it were not such then, and that he desired to make said plaintiffs the beneficiaries under said policy; that said insured inquired of said agent, W., whether a new policy should be made, but that said agent assured said A. C. that a new policy would not be necessary; that he, the said W., would make said policy as good as a new one to said plaintiffs, and that thereupon said agent indorsed upon said policy the following, to wit:

Loss, if any, under this policy on buildings payable to A. R. H. and I. C., mortgagees, as their interest may appear, and on contents of barn to C. V. C.

D. W. W., agent, H. O.

Said mortgage executed to said R. and W., and duly assigned and transferred as aforesaid to plaintiff, A. R. H., and the debt thereby secured, is wholly unpaid and unsatisfied, and said insured, A. C., is indebted to said plaintiff H. thereon in the sum of — dollars, with interest at — per cent., payable annually, on \$—, from the — day of —, 18—.

And said mortgage executed to I. C., and the note thereby secured, is wholly unpaid and unsatisfied, and there is due said plaintiff, I. C., thereon from said insured, A. C., the sum of — dollars, with interest on \$—, at rate of — per cent. per annum, from — day of —, 18—.

And plaintiffs further say that the said D. W. W. was on the — day of —, 18—, the duly appointed and authorized agent of the said O. F. Insurance Company, with full power to make insurance by policies of said company, to make such indorsements, to consent to incumbrances, liens, transfers, assignments, and to do all other things pertaining to the business of said agency; and that said agency was in force during all of the transactions hereinbefore mentioned. That plaintiffs, through the said insured, on the — day of —, 18—, made known to said agent W. the exact condition of said property so insured, and fully explained to him the nature and amount of said incumbrances and liens, and the fact of said transfer of said personal property, and that with such knowledge said agent W. agreed that said policy, when so indorsed by him as aforesaid, should have the force and effect of a new policy. That said plaintiffs, believing that such was the case, relied and acted upon the statements and agreements so made by said agent; that said insured has duly performed all the conditions on his part to be performed, and that on the — day of —, 18—, the said barn and corn-house, and the contents of said buildings, consisting of hay, grain, fodder, seed, wagons, carriages, harness and farming implements, were totally destroyed by fire, and that immediately thereafter, on the — day of —, 18—, said A. C. duly notified defendant

of said loss, and on the — day of —, 18—, and more than ninety days prior to this action, gave defendant due proofs of said loss and rendered to defendant a particular account of the same. That said buildings and property so destroyed were of the value of \$—. That on the — day of —, 18—, the said defendant by their agent, one G. H. M., carefully adjusted said loss and agreed to pay the same.

But plaintiffs say that said loss has not been paid, nor any part thereof, and that defendant refuses to pay the same, though often requested so to do.

Wherefore plaintiff prays judgment against the said defendant, the O. F. Insurance Company, in said sum of \$—, with interest thereon from the — day of —, 18—.

NOTE.—From *Ohio Farmers' Ins. Co. v. Hames et al.*, error to circuit court of Carroll county, Supreme Court, unreported, No. 1854. Judgment in favor of petitioners in common pleas and circuit court and supreme court.

Sec. 704. Petition by mortgagee building association for loss of property mortgaged.—

Plaintiff is and at all times hereinafter mentioned was a corporation duly incorporated and existing under and by virtue of the laws of the state of Ohio, and having its place of business in the city of C., in the county of —, and state of Ohio, and at all said times it had and has an interest, by reason of a mortgage in the property hereinafter described, greater than the amount of the policy hereinafter mentioned. At all said times defendant was and it is an insurance corporation, duly incorporated and existing under and by virtue of the laws of the state of New York, and having at all said times, ever since and now, an office, agency and general agent doing business in said C.

On the — day of —, 18—, at said C., in consideration of \$— then in hand paid by one M. E. R., the owner in fee-simple of the premises, subject to plaintiff's said mortgage hereinafter described, said defendant made, executed and delivered to said M. E. R., who was then, ever since has been, and is a resident of said city of C., and to this plaintiff, a policy of insurance, by which said defendant insured said M. E. R., loss, if any, payable to this plaintiff as its interest might appear, in the sum of \$—, against loss or damage by fire on her frame dwelling-house in the rear of No. — R. street in said C., and agreed to make good and indemnify said M. E. R., and this plaintiff as its interest might appear, against all such immediate loss or damage as might happen to said building by fire from the — day of —, 18—, at noon, to the — day of —, 18—, at noon, to be paid sixty days after proofs of loss made by said M. E. R. were received at the office of the general agency of said company in New York. Said M. E. R. and this plaintiff have complied with all the conditions of said

policy to be by them performed. Afterwards, to wit, on the — day of —, 18—, said building was wholly consumed by fire. Proofs of loss were, on the — day of —, 18—, made out in accordance with the terms of said policy and delivered to said defendant at said New York, who made no objection thereto; the delay in making out and delivering said proofs of loss occurring by agreement with said defendant. At the time of said issuing and delivery of said policy and of the application therefor the cash value of said building was agreed between this plaintiff, said M. E. R. and this defendant to be \$—, which sum was then and there the real cash value thereof, and said premium so paid as aforesaid was the premium for said period on said sum. Before issuing said policy said defendant's agent made a full examination and description of said building and fixed its insurable value at \$—. No changes were made in said building affecting said value thereafter and before said fire. Said M. E. R. has assigned to this plaintiff all claim she may have against said defendant by reason of the premises.

By reason of the premises, on the — day of —, 18—, said defendant became and was indebted to plaintiff in the sum of \$—, and it became and was the duty of said defendant to pay to this plaintiff at said C. said sum of \$—, which sum this plaintiff then and there demanded of said defendant, but defendant refused and neglected to pay the same or any part thereof, and ever since has failed and neglected to pay the same or any part thereof, although often thereto requested by plaintiff.

Therefore plaintiff prays judgment against said defendant for the sum of \$—, with interest thereon from the — day of —, 18—.

M., N. & W.,

Plaintiff's Attorneys.

NOTE.—From *Hanover Fire Ins. Co. v. Citizens' Savings & Loan Ass'n*, error to circuit court of Cuyahoga county, Supreme Court, unreported, No. 1552.

Sec. 705. Petition where conditions of policy as to proofs of loss not complied with on account of statements of adjuster.—

[*Averments as in ante, sec. 702.*]

Plaintiffs aver that they have fully complied with and performed the agreements and conditions contained in said policy to be complied with and performed by them, or so far as from the nature of things existing they could comply with and perform the same.

That immediately after said fire they gave notice in writing to said defendant of said loss resulting therefrom.

That shortly thereafter an adjusting agent was sent by defendant to the place where said fire occurred to examine into

the circumstances of said fire and the loss and destruction of said insured property thereby, and the loss and damage resulting to plaintiffs therefrom, who, after making said examination and obtaining information and evidence in regard thereto, informed plaintiffs that said loss was covered by said policy and that he would report, recommend and advise, without further proofs, the payment of \$—— for the loss and damages sustained by them. That in consequence of such information from said adjusting agent, plaintiffs delayed for some time the furnishing of the proofs of loss as required by the conditions of said policy, but subsequently, upon learning that said loss would not be paid by defendant, they, under date of ——, 18——, made out in writing, duly authenticated and certified, the proofs of said loss as required by the conditions of said policy, and procured the same to be forwarded to said defendant at its office in N. O., La., and the same was so forwarded to and received by it at its office ——, 18——.

Plaintiffs aver that more than sixty days have elapsed since the receipt by defendant of said proofs of loss, but defendant has wholly neglected, failed and refused to pay said sum of —— dollars as by the terms of said policy it was required to do, or any part of the same. They aver that their said loss and damage caused by the burning of their said store-house and stock of merchandise is \$—— and more.

They therefore ask judgment against said defendant for said sum of —— dollars, with interest thereon from ——, 18——.

M. & N.,
Plaintiffs' Attorneys.

NOTE.— From *Coleman & Co. v. Insurance Co.*, 49 O. S. 810.

Sec. 706. Petition on policy asking for equitable relief against mistake by inserting wrong name of insured, and for recovery thereon.—

[*Caption and averments as in ante, secs. 701, 702.*]

1. The plaintiff says that on the —— day of ——, 18——, the plaintiff was the owner of certain store furniture and fixtures, and a certain stock of dry goods, hardware, queensware, hats, caps, boots, shoes and other articles not more hazardous, as are usually kept for sale in country stores, and all contained in the first and second story of the iron and shingle roofed frame building occupied by him as a general store, and situate on the north side of —— street, in the town of ——, in the county of ——, Ohio.

That on or about said day said plaintiff applied to a duly authorized agent of defendant company for insurance against fire in said company on said furniture and fixtures to the amount of \$——, and upon said stock to the amount of \$——,

and thereupon, in consideration of \$—— then and there paid to said agent, the said defendant company agreed to issue to him a policy of said company in its usual form, insuring him against loss or damage by fire, etc., upon said property to the amount aforesaid from said ——, 18——, at noon, and for the period of one year and until ——, 18——, at noon.

And said company by its said agent afterwards and on the same day delivered to plaintiff its policy No. ——, duly executed by its president and secretary and countersigned by said agent, the original of which is hereto attached, in pursuance and performance of said contract, and the same was so accepted and received by said plaintiff, and the same was not at the time read or examined by the plaintiff, nor did he know that any mistake had been made therein by said agent in filling out the policy until after the loss of said property by fire as hereinafter and in the next count stated.

The plaintiff further says that, by mere mistake and inadvertence, in the blanks provided in said policy for the name of the assured to be written, the said agent wrote the name of the said defendant W. H. L., and described him as the assignee of said plaintiff.

The plaintiff therefore prays that said mutual mistake of the parties may be relieved against and said policy made to conform to the intention of the parties, and for other proper relief in the premises.

2. On the day aforesaid, the plaintiff being the owner of the property aforesaid, in consideration of the premium paid by plaintiff to defendant company as aforesaid, said defendant, by its policy of insurance No. ——, in the manner aforesaid, insured the plaintiff against loss or damage by fire to the amount of \$—— on the property aforesaid from —— at noon to —— at noon.

Plaintiff has performed all the conditions of said policy on his part to be performed, and on ——, 18——, said property was damaged and partly destroyed by fire and otherwise injured to the amount of \$—— (and said defendant company at once took possession of said property and excluded the plaintiff therefrom for the period of seven days).

The plaintiff on said ——, 18——, gave said defendant company notice of said loss, and on ——, 18——, and more than sixty days prior to this action, gave said defendant proofs of said loss in due form. No part of said loss has been paid.

Wherefore plaintiff prays judgment against said defendant company for \$—— and interest from ——, 18——, and for other proper relief.

C. D. M. and B. & B.,
Attorneys for Plaintiff.

NOTE.— See *Globe Ins. Co. v. Boyle*, 21 O. S. 119.

Sec. 707. Petition for reformation of amount of policy and judgment for amount.—

[*Averments as in ante, secs. 701, 702.*]

That the amount of insurance agreed upon by the plaintiff and defendant at the time of the payment of the consideration was the sum of \$— upon store-room and stock of goods therein, but the amount of \$— was, by mistake of the agent who made out the policy, erroneously inserted.

That on the — day of —, 18—, said store-room and stock of goods was totally destroyed by fire.

That at the time of the delivery of said policy to plaintiff he supposed it had been drawn in accordance with their agreement, but did not read the same, and did not learn of the error therein until after said fire.

That said store and stock was of the value of \$—.

That on the — day of —, 18—, the plaintiff furnished defendant with proof of loss by said fire, and has in all things duly performed all the conditions of said policy on his part to be performed, and that no part of said loss has been paid.

Plaintiff therefore prays that said policy may be reformed by inserting therein the correct amount of said insurance according to said agreement, and for judgment against the defendant for the sum of \$— and costs of suit.

NOTE.— A contract of insurance may be reformed for mutual mistake. Evidence of the agent and insurer in relation to the object of the policy and the interest to be insured is admissible. *Globe Ins. Co. v. Boyle*, 21 O. S. 119.

Sec. 708. Petition by trustees of fraternal society for loss upon property, including improvements, on real estate held under lease.—

Plaintiffs say that they are trustees, duly chosen and qualified, of the Gibulum Lodge of Perfection, Ancient Accepted Scottish Rite, and that said Gibulum Lodge was, at the several times hereinafter mentioned, and now is, one of the various bodies of the Ancient Accepted Scottish Rite Masons; and they say that the defendant, the Western Insurance Company, is a corporation under the laws of the state of Ohio.

The plaintiffs further say that on the — day of —, 18—, at the city of —, defendant, by its certain policy of insurance duly executed on that day, did insure the masters and wardens of Nova Cesarea Harmony Lodge, No. 2, Free and Accepted Masons, a corporation, against loss or damage by fire, in the sum of — dollars, for the period of — years next ensuing, on all permanent improvements, fixtures

and repairs made in those certain apartments and portions of a certain building known as the Masonic Temple, situated on the northeast corner of Third and Walnut streets, in the city of —, Ohio, occupied by the various bodies of the Ancient Accepted Scottish Rite Masons; and the said policy did provide that the loss, if any, thereunder, should be payable to the trustees of Gibulum Lodge of Perfection, Ancient Accepted Scottish Rite, said lodge being, at the date of said policy, and at the present time, *the owner, as lessee thereof*, of all that portion of said building described as aforesaid in said policy, and of all improvements, fixtures and repairs made in the apartments of said building occupied by the various bodies of the Ancient Accepted Scottish Rite Masons, and of all frescoing and wall decorations thereof, and of all other property covered by said policy of insurance — *said Harmony Lodge being the owner of said Masonic Temple*, but having leased the said portions thereof, hereinbefore mentioned, to said Gibulum Lodge, which, *as lessee, improved, furnished and decorated the same*. And the said policy did further provide the privilege of additional insurance in any insurance company; and also of making necessary alterations and repairs without notice or extra charge; and further, that said policy should apply to and cover all frescoing and wall decorations in addition to other items hereinbefore mentioned.

Plaintiffs further say that it came to pass that on the — day of —, 18—, all of the said property, apartments and portions of said building, hereinbefore described, were totally destroyed by fire; and thereafter, to wit, on —, 18—, and again, the — day of —, 18—, the plaintiffs caused to be made and delivered to the defendant proper proof of loss of said building as required by and in accordance with the terms of said policy, and demanded payment of the same, which the defendant has failed and refused, and still fails and refuses, to pay, although by the terms of said policy this defendant undertook and agreed to pay any loss accruing under said policy within sixty days after the filing with said company of said proofs of loss.

Plaintiffs say that the other insurance upon the property herein mentioned, including policy now in suit, amounted to — dollars; that the total amount of the loss or damage sustained by said Harmony Lodge upon the property hereinbefore mentioned, by reason of said fire, is — dollars and — cents; that by the terms of said policy it was provided that, in case of total loss, the amount to be paid by the defendant under its policy aforesaid should not exceed a greater proportion than the amount insured in said policy bears to the whole amount insured on the property.

Plaintiffs say that said Harmony Lodge has observed all

the terms and conditions of said policy of insurance incumbent upon them, and ask judgment against the defendant in the sum of — dollars, with interest thereon from the — day of —, 18—, and costs.

H. J. & C.,
Attorneys for Plaintiffs.

NOTE.—From *Carson v. Western Ins. Co.*, error to Super. Ct. Cin., Supreme Court, unreported, No. 1755.

Sec. 709. Fire insurance.—The answer.—If a loss is caused by the fraudulent act of the insured, the company may set the same up as a defense to an action upon the policy.¹ Where a company takes a note in payment of a premium it is estopped from setting up the non-payment thereof in case of loss.² When one has had the benefit of insurance, and the company becomes insolvent and goes into the hands of a receiver, a member cannot set up fraud as a defense after rights of innocent creditors have intervened.³ Nor can the company, in the absence of intentional fraud on the part of the insured, in case of a total loss show that the value of the property is less than that fixed in the policy.⁴ Nor can a company take advantage of the failure to make the examination of the property which is required by statute, as it is not justified in relying upon any statement of the insured claiming it to be fraudulent.⁵ Nor can persons dealing with a foreign company deny its power to enter into the contract sued upon.⁶ Where a husband and wife represent that they are the joint owners of the premises insured, the policy to be void if in fact the title be in the wife alone, no recovery can be had if this representation prove false, even though there is no intentional fraud;⁷ and a false representation as to the amount of incumbrance upon the premises insured will avoid the policy.⁸ It is immaterial whether the misrepresentations are

¹ *Insurance Co. v. Sherlock*, 25 O. S. 50.

² *Krumm v. Insurance Co.*, 40 O. S. 280.

³ *Mansfield v. Woods*, 29 W. L. B. 111; *Newberg Petroleum Co. v. Weare*, 27 O. S. 844; *May on Ins.*, sec. 552; *Lucas v. Granville Ass'n*, 20 O. S. 389. See *Rundle v. Kennan*, 79 Wis. 492; 48 N. W. Rep. 516.

⁴ *Insurance Co. v. Leslie*, 47 O. S.

409. Where there is a separate valuation upon different things the contract is severable. *Insurance Co. v. Ward*, 50 Kan. 346; 81 Pac. Rep. 1079.

⁵ *Insurance Co. v. Leslie*, 47 O. S. 418; R. S., secs. 3643, 3644.

⁶ *Newberg Petroleum Co. v. Weare*, 27 O. S. 844.

⁷ *Insurance Co. v. Webster*, 7 O. C. 511.

⁸ *Hutchins v. Insurance Co.*, 11

intentionally made, as they will in any event avoid the policy, if material.¹ In setting up a defense that the insured concealed certain matters material to the risk, it should be averred that the insured knew of the existence of the fact concealed, and that the same was not open and notorious to all parties.² Where it is provided that the preliminary proof of the loss must be furnished within a certain time, failure so to do will constitute a defense to an action thereon.³ Nor is such a defense waived by setting up and relying upon other defenses not inconsistent therewith.⁴

Where the condition of a policy is that all subsequent insurance of the same property in other companies will render the same invalid, the taking of other insurance may be set up by the company as a valid defense;⁵ but there can be no breach available to the company, where a policy contains such condition, by taking additional insurance which for any reason is invalid or never took effect.⁶ The fact that a mortgage was given without the consent of the company cannot be urged as a defense to an action on a policy which provides that the property shall not be sold, transferred or any change made in the title without the consent of the company.⁷ The consent of an agent of the company to alienation by an assignment upon the policy has the same effect as a new policy.⁸ A condition

O. S. 480; *Davenport v. Insurance Co.*, 6 Cush. 840; *Howard v. Insurance Co.*, 10 Cush. 444; *Brown v. Insurance Co.*, 11 Cush. 280; *Byers v. Insurance Co.*, 35 O. S. 606.

¹ *Byers v. Insurance Co.*, 35 O. S. 606; *Insurance Co. v. Spankneble*, 52 Ill. 53; *Insurance Co. v. Eddy*, 55 Ill. 213; *May on Ins.*, sec. 269.

² *Insurance Co. v. Insurance Co.*, 1 Handy, 408; s. c., 5 O. S. 450.

³ *Insurance Co. v. Frick*, 29 O. S. 466; *Insurance Co. v. Lindsey*, 26 O. S. 348.

⁴ *Insurance Co. v. Frick*, *supra*. But it is otherwise if the defenses are inconsistent. *Insurance Co. v. Kulkral*, 7 O. C. C. 362. See *Railroad Co. v. Insurance Co.*, 105 Mass. 570; *Insurance Co. v. Scholleberger*, 43

Pa. St. 259. It is not a defense that the particulars were not furnished until a year after the loss, if that be a reasonable time. *Kirk v. Insurance Co.*, 6 W. L. R. 200.

⁵ *Insurance Co. v. Railway Co.*, 22 O. S. 69. As to what constitutes other insurance, see *Kimble v. Insurance Co.*, 8 Gray, 33; *Bigler v. Insurance Co.*, 23 N. Y. 402; *Conway Toll Co. v. Hudson Insurance Co.*, 12 Cush. 144.

⁶ *Knight v. Insurance Co.*, 26 O. S. 664; *Insurance Co. v. Holt*, 35 O. S. 189.

⁷ *Byers v. Insurance Co.*, 35 O. S. 606; *Insurance Co. v. Spankneble*, 52 Ill. 33; *Insurance Co. v. Eddy*, 55 Ill. 213; *May on Insurance*, sec. 269.

⁸ *Insurance Co. v. Wall*, 31 O. S. 628.

as to change of ownership is not invalidated by sale of stock during the life of the policy, where it has been reconveyed to the original owner before loss.¹ The fact that the premises insured are incumbered by dower is not a violation of a condition against an incumbrance, especially where the application for the insurance is made by the widow.² Where the conditions of a policy are such that either party may terminate it upon giving notice, the same may be terminated by merely giving notice without returning the unearned premium.³ This is also true where there is no agreement in the policy as to the return of unearned premiums; where it is so provided in the policy the rule is otherwise.⁴ The fact that the premises have been vacated by the permanent removal of a tenant of the insured, before the expiration of a lease, without the knowledge or consent of the landlord, is a good defense when the policy is conditioned to become void if the premises are vacated.⁵ A contract of insurance with an infant being only voidable, the company cannot set up infancy as a defense to an action thereon.⁶ The obligation to observe the conditions of a policy rests upon the insured only; and where the loss is made payable to a third party who is a tenant in possession of the building insured, the action of the latter increasing the risk to the premises, contrary to the provisions

See *Insurance Co. v. Ashton*, 31 O. S. 477. As to acts of agents see *Wood on Insurance*, sec. 407; *Pratt v. Insurance Co.*, 55 N. Y. 505; *Insurance Co. v. Wall*, 31 O. S. 633. This is opposed to *Cockerill v. Insurance Co.*, 16 O. 148; but that case, holding that verbal agreements with respect to insurance are invalid, is virtually overruled. *Insurance Co. v. Kelly*, 24 O. S. 345. See *Insurance Co. v. Shaw*, 94 U. S. 547; *May on Insurance*, sec. 41.

¹ *Insurance Co. v. Lewis*, 1 O. C. C. 79; 18 W. L. B. 592. In *Lane v. Insurance Co.*, 12 Me. 44, it was held that where the assured sold the goods, the purchaser keeping them but a short time, then conveying the same back to the assured, there was

not such *alienation* as vitiated the policy. See 1 *Wood on Insurance*, sec. 330 et seq.

² *Insurance Co. v. Britton*, 31 O. S. 483. See *Insurance Co. v. Webster*, 7 O. C. C. 511; *R. S.*, sec. 3643.

³ *Insurance Co. v. Breckeisen*, 50 O. S. 542; 30 W. L. B. 303; *Insurance Co. v. Sammons*, 11 Bradw. 280; *Wood v. Insurance Co.*, 126 Mass. 219; *Insurance Co. v. Reynolds*, 36 Mich. 506; *Richards on Insurance*, sec. 137.

⁴ *Insurance Co. v. Breckeisen*, *supra*.

⁵ *Insurance Co. v. Wells*, 42 O. S. 519; *Insurance Co. v. Webster*, 7 O. C. C. 531.

⁶ *Monahan v. Insurance Co.*, 18 Rep. 176; 13 W. L. B. 89; *Insurance Co. v. Noyes*, 32 N. H. 345.

of the policy, cannot be pleaded as defense to his claim for the loss, because the contract of the company is with the insured.¹

Sec. 710. Answer averring breach of conditions.—

1. The defendant admits that at the various periods in the petition named it was an incorporated company organized under the laws of L., with its principal office and place of business at N. O. in said state, and with an agent authorized to transact business for it located at P. in — county, Ohio. And defendant admits that under date of —, 18—, acting through its said agent, L. C. D., it issued in said — county its policy of insurance, whereby, in consideration of — dollars paid and of the agreements and conditions therein contained, it did insure H. C. & Co. in the amount of — dollars on the property described in the petition and for the period in the petition named. Defendant denies each and every allegation in the said petition not hereinbefore expressly admitted to be true.

2. The said policy was issued and was accepted by the assured upon the following condition and agreement, expressed therein, to wit: [*Copy.*]

In applying for the said insurance the plaintiff, the assured, stated and represented that there was no building within one hundred feet of the store-house in the policy described, and that the said store-house belonged to and was the property of the assured, the said H. C. & Co. By the aforesaid condition of the policy, the said statements and representations became a part of the policy, and by the assured were warranted to be true. There was a building within the distance aforesaid, and the said store-house was not the property of the said H. C. & Co. Wherefore the said policy was wholly void.

3. The said policy was issued and was accepted by the assured upon the following condition and agreement, expressed therein, to wit, that this policy shall become void: "If the assured is not the sole and unconditional owner of the property." The said H. C. & Co., the assured, were not the sole and unconditional owners of the said store-house at the time the said policy was issued.

4. The said policy was issued and was accepted by the assured upon the following condition and agreement, expressed therein, to wit, that this policy shall become void: "If any building intended to be insured stands on ground not owned in fee-simple by the assured." The said store-house, intended

¹ *Sanford v. Insurance Co.*, 12 Cush. jury. *Insurance Co. v. Insurance*
541. It is often a question for the Co., 5 O. S. 450.

to be insured by the said policy, stood on ground not owned in fee-simple by the assured, H. O. & Co.

5. The said policy was issued and was accepted by the assured upon the following conditions and agreements, expressed therein, to wit: that "loss under this policy shall not be due and payable until sixty days after the receipt of proofs in due form, nor until a full compliance with the requirements of this policy in respect to proofs, statements, examinations or appraisals has been made by the assured," and that "No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements." The plaintiffs, the assured, have not complied with the said requirements of the said policy, therein expressed, in that they did not within the time limited in the said policy, to wit, as soon as possible after the alleged loss, nor at any time, make out and deliver such particular statement and account of said alleged loss as is required by said policy, and did not, as required by said policy, furnish a detailed estimate of disinterested appraisers, made under oath, as to the loss upon the said store-house, and did not, as required by said policy, furnish a detailed schedule and inventory showing the quantities, qualities and costs of the various articles of personal property and merchandise alleged to have been destroyed.

W. & W.,

Attorneys for Defendant.

NOTE.—From *Coleman v. Insurance Co.*, 49 O. S. 810.

Sec. 711. Answer setting up fraudulent representations and concealment as to incumbrances by insured.—

1. For defense to this action defendant says that by the terms of said policy of insurance it was, among other things, stipulated and agreed that the defendant should not be liable on said policy of insurance if there should be any false representation as to the condition, situation or occupancy of said property, or if there should be any misrepresentation whatever by the assured, or if the interest of the assured in the property be not truly stated in the application, which is, by agreement of said parties, a part of the contract of insurance, and a warranty by the assured of the truth of the facts therein stated.

Defendant says that plaintiff, A. O., in the application for said insurance, falsely represented that said property was unincumbered, save by a mortgage for \$—, and falsely represented that he was the absolute owner of said property, subject only to said mortgage for \$—, whereas, in fact and in truth, said property was at that time incumbered by mortgage in the amount of \$— (and interest on said sum at eight per cent. for a length of time not known by this defendant);

and said C. was not the owner of said property, subject only to said mortgage for \$——, all of which was well known to said A. C., but was wholly unknown to the defendant. And by reason of said misrepresentation and the failure of said assured to truly state his interest in said property, said policy of insurance is wholly void and of no force and effect whatever.

2. Defendant says that the policy of insurance sued on in this action was issued by defendant to said A. C. upon his written application therefor, and, by the agreement of the parties to said policy, said application was to be a part of the contract of insurance, and a warranty by the assured of the truth of the matter therein stated. And defendant says that by the terms of said policy and application, it was further stipulated and agreed that any omission to make known every fact material to the risk should render the said policy void.

Defendant says said A. C. omitted to make known to defendant that said property was incumbered by mortgage to the amount of \$——, and unpaid interest thereon, or was incumbered more than \$——. Defendant says that said property was incumbered to the extent of \$—— (and unpaid interest thereon, the amount of which is to defendant unknown), by mortgage valid and subsisting, as said A. C. well knew when he applied for said insurance, but said fact was wholly unknown to defendant. The fact of said property being so incumbered was material to the risk, and said A. C.'s omission to make said fact known, by the terms of said policy and agreement of the parties thereto, avoids the same.

3. Defendant says that the policy of insurance sued on in this action was issued by the defendant to the said A. C. upon his written application therefor, and by the agreement of the parties to said policy said application was to be a part of the contract of insurance, and warranty by the assured of the truth of the matter therein stated. And defendant says that, by reason of the premises, said policy of insurance has become void, and plaintiff ought not recover thereon. Wherefore defendant asks to be dismissed with its costs.

NOTE.—The action of a soliciting agent in wrongfully stating facts correctly given him by assured binds the company. *Insurance Co. v. Williams*, 39 O. S. 584. He is the agent of the company and not of applicant. *R. S.*, sec. 8644; *Savings Bank & B. Ass'n v. Insurance Co.*, 81 Conn. 517. And is acting within scope of his authority in filling up blank applications. *Rowley v. Insurance Co.*, 86 N. Y. 550; *Baker v. Insurance Co.*, 64 N. Y. 648-50; *Mowry v. Rosendale*, 74 N. Y. 863; *Flynn v. Insurance Co.*, 78 N. Y. 577.

Sec. 712. Answer that policy is invalidated by reason of sale of property insured, and judgment against same.—

Defendant says that, among other things, it was expressly agreed and provided by said policy (and contract of insurance), that if said property should be sold, transferred or in-

cumbered by mortgage or otherwise, or levied on, or any change should take place in the title or possession thereof, whether by judicial decree or voluntary transfer, without the written consent of the defendant company, the policy of insurance should be void.

Defendant says that after said policy was issued as aforesaid, A. C., the assured, on the — day of —, 18—, and on the — day of —, 18—, executed and delivered to R. R., W. W. and I. C. his certain mortgage on said property as stated in the petition. On said — day of —, 18—, said A. C. further incumbered said premises by executing and delivering to J. H. a mortgage thereon to secure said H. the payment of \$—.

On the — day of —, 18—, as set forth in the petition, the said A. C. sold to the plaintiff C. V. C. all his right, title and interest in and to that part of the personal property covered by said policy of insurance yet owned by said A. C., and transferred to said C. V. C. all his interest in said property so remaining, and said remaining part of personal property ever since the said — day of —, 18—, has been in the possession of said C. V. C.

By the consideration of the common pleas court of — county, Ohio, J. H., having recovered two judgments against the said A. C. and another, caused executions to be issued thereon, which executions were, on the — day of —, 18—, duly levied on the property insured by said policy, and so said property became incumbered to the extent of \$— debt, and costs \$—.

R. R. recovered two judgments against the said A. C. and others by the consideration of the said — county common pleas court and caused executions to issue thereon, which said executions were duly levied on said property on the — day of —, 18—, and thereby said property became incumbered to the amount of \$—.

And defendant says, by reason of the premises, said policy of insurance has become void (and was void from the beginning), and plaintiffs ought not to recover thereon against this defendant.

Wherefore defendant asks to be dismissed with its costs.

NOTE.— From *Ohio Farmers' Ins. Co. v. Haines*, ante, sec. 708. A provision to the effect that a sale or transfer shall forfeit a policy will not avoid the policy unless the assured's entire interest is sold. *Blackwell v. Insurance Co.*, 48 O. S. 533.

Sec. 713. Answer that mortgagee has ample security in real estate, and that the policy became void because of breach of condition as to premises becoming vacant.—

1. The defendant for answer to plaintiff's petition admits that plaintiff and defendant are corporations as alleged. Ad

mits that defendant insured, for the consideration named in plaintiff's petition, the house of M. E. R. for the time named in said petition, and that said policy of insurance was made payable to plaintiff as its interest might appear. Defendant says that plaintiff had made to M. E. R. a loan upon the premises on which said dwelling was situated, and, as additional security to the mortgage received by plaintiff, took the conditional assignment in said policy written; and this defendant avers on information and belief that the real estate covered by said mortgage securing plaintiff is ample security, and that, by reason of said condition written in said policy, plaintiff has, and obtained, no interest in said policy, and for want of knowledge this defendant denies all further assignment of said policy to plaintiff, and denies that there was any consideration for any other or further assignment, and denies that plaintiff has any interest in any loss sustained by said M. E. R.; and defendant denies that said dwelling was of the value of \$——, and denies that the same was wholly consumed by fire, and denies all allegations in said petition contained not herein admitted.

2. For a second defense this defendant says that, by the terms and conditions of the policy issued by this defendant upon the dwelling-house of said M. E. R., said policy became void and was void, and of no force or effect on —, 18—, for this defendant says it was provided in said policy that if said house became vacant and unoccupied without the written consent of defendant, then and in every such case the said policy shall be void; and defendant says that on and prior to —, 18—, the said frame dwelling-house had, without the written consent of this defendant, become vacant and unoccupied, whereby said policy became and was void and of no effect at and prior to the time of said fire so alleged in plaintiff's petition; whereupon defendant asks to go hence without costs.

E., D. & S.,

Defendant's Attorneys.

NOTE.—From *Hanover Ins. Co. v. Citizens' Savings & L. Ass'n*, error to circuit court of Cuyahoga county, No. 1552. An absolute condition that policy shall be void "if the building be vacated or left unoccupied" avoids the policy, although a tenant vacates before expiration of his lease without knowledge or consent of landlord. *Insurance Co. v. Wells*, 42 O. S. 519. See, also, *Walsh v. Insurance Co.*, 73 N. Y. 5.

Sec. 714. Answer claiming fraudulent concealment of interest of and false representations as to occupancy of premises, and breach of provision as to notice of loss.—

First. That heretofore, to wit, on the — day of —, 18—, defendant issued a policy of insurance to plaintiff; that said policy was in writing, and was substantially as set forth in plaintiff's petition; that said policy was issued to plaintiff in

consideration of \$—— and of the conditions and limitations therein set forth, and that among the conditions and stipulations set forth in said policy, as more fully set out in plaintiff's petition, is the following: [*Copy clause of policy as to requirement or condition of description of property.*]

But this defendant says that the interest of the assured in the property intended to be insured by this policy was not truly stated to the defendant, but was wilfully concealed, in that said property was conveyed and incumbered by two or more deeds of mortgage; and defendant says that the interest of the assured in said property is not the entire, unconditional and sole ownership of said property; but plaintiff says that said property had been conveyed by said plaintiff by several mortgage deeds, which were, at the date of the issue of said policy and continued until the time of the fire on the —— day of ——, 18——, liens and incumbrances on said property, to the extent of its entire value.

[*False representations as to occupancy of premises.*]

Second defense. The defendant [*formal averment*], and further says that, among other things represented to the defendant at the time said policy of insurance was procured, was that the buildings desired to be insured were occupied by the insured and family as a dwelling and saloon and for no other purposes; and defendant says that said buildings were occupied as a public dance hall, and were leased to societies, to wit, the second story thereof, and that such representations made by plaintiff as to the occupancy of said premises, as heretofore set forth, were false, were known by plaintiff to be false, and were made for the purpose of defrauding the defendant.

[*Breach of conditions.*]

Third defense. The defendant [*formal averment*] further says that among other terms, conditions and agreements in said policy was the following, to wit: "When a fire has occurred injuring the property herein described, the assured shall give immediate notice of the loss in writing to this company, and within fifteen days after the fire, unless the time be extended by the company in writing, shall render to the company," etc. And said defendant says that the plaintiff did not render to the defendant, within fifteen days after the fire, a particular statement of the loss, signed and sworn to by the assured, stating such knowledge or information as the assured had been able to obtain as to the origin and circumstances of the said fire, and also stating the title and interest of the assured and of all others in the property, the cost value thereof, the amount of loss or damage, all other insurance covering any of said property, and a copy of the written parts of all policies, and the occupation of the entire premises; and defendant says that the time for surrendering such state-

ment was not extended by the defendant, and defendant denies that it waived the rendering of said statement within fifteen days and by any act of defendant prevented plaintiff from complying with that provision of the policy.

Fourth defense. And for a fourth defense herein the defendant refers to each and all of the allegations contained in the first, second and third defenses and makes them a part hereof as fully and completely as though written at length herein; and defendant further says that it is a corporation organized under the laws of the state of Pennsylvania, and it denies each and every other allegation and statement contained in said petition.

Therefore this defendant asks to be dismissed with its costs.

J. O. W.,

Attorney for Defendant.

NOTE.—From United Fireman's Ins. Co. v. Kukral, error to circuit court of Cuyahoga county, No. 1699, 27 W. L. B. 811.

Sec. 715. Answer by assignee of policy held as collateral security.—

[Caption.]

That ever since the — day of —, 18—, he has been and now is the *bona fide* owner and holder of a certain promissory note, of which the following is a true copy, to wit: [Copy of note of the assured, with indorsements.]

That there is due to this answering defendant from said F. K. and M. K., upon said promissory note, the sum of \$—, with interest at the rate of — per cent. on \$— thereof from —, 18—; on \$— thereof at — per cent. from —, 18—; on \$— thereof from —, 18—, and on \$— from —, 18—.

That to secure the payment of said promissory note, said M. K., the plaintiff in this action, did on the — day of —, 18—, assign and transfer to this answering defendant, as collateral security, the sum of — dollars of her claim against the defendant, the U. F. Insurance Company of —, set forth in the petition herein, and that on the said — day of —, 18—, this answering defendant duly notified said U. F. Insurance Company of said assignment and transfer. By reason of the premises this answering defendant claims a valid and subsisting lien for the payment of the amount due him upon said promissory note from said defendants, F. and M. K., to the extent of — dollars, upon the claim of said M. K. against said U. F. Insurance Company, set forth in the petition herein, and prays the court for the protection of the same.

F. N.,

Defendant's Attorney.

Sec. 716. Reply by insured that breach of conditions was waived by company.—

And now comes said plaintiff, the Citizens' Savings and Loan Association, by M., N. & W., its attorneys, and for reply to the second defense contained in the answer filed herein by said defendant, the H. Fire Insurance Company, says:

It denies each and every averment therein contained.

Further replying to said second defense, said plaintiff says:

Said policy contained the following provisions and no other on the subject of the occupancy of said premises: "or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever, within the knowledge or control of the assured, without the written assent of the company indorsed hereon, then and in every such case this policy shall be void." Said building was situated on the rear part of the lot on which said M. E. R. resided, and at the time said policy was issued was occupied by her tenants, all of which was then well known to the general agent of said defendant who issued to her said policy, and without whose countersigning said policy was not valid. Afterwards without consent of said M. E. R., and without her power to prevent the same, said tenants left said house. She at once notified said general agent thereof, who told her that it was all right and he would call and see her at her house in a few days, and thereby prevented her from then insisting on written consent being indorsed on said policy or obtaining other insurance. Plaintiff avers that said defendant by said general agent waived said clause, consented to said house so remaining vacant until he saw her, and induced her and this plaintiff to believe said policy in force. No one did call on said M. E. R. on behalf of said defendant or said general agent until after said fire, which occurred a few days after said notice to said general agent. In the meantime said M. E. R. had commenced to move into said house from her residence on the front of said lot, and at the time of said fire had moved part of her furniture therein and was occupying it during the business hours of the day by placing and arranging therein said furniture, and also during said hours and others for other living purposes. Said temporary vacancy occurred and existed entirely from causes beyond the control of said M. E. R. Plaintiff avers that said premises never were unoccupied within the time, intent and meaning of said policy, that defendant assented to such vacancy and non-occupancy as did occur, and is estopped from asserting such vacancy and non-occupancy

as a defense herein, and that such vacancy and non-occupancy as there had been had ceased before said fire occurred.

M., N. & W.,
Plaintiff's Attorneys.

NOTE.—The burden of proof of waiver is on the plaintiff. An agent may waive by parol. If assured has notice of limitation of agent's power, or if there is anything to put him on inquiry as to his actual authority, then acts in excess of authority are not binding. Wood on Fire Ins., sec. 411. By accepting policy containing express limitation of agent's authority, the assured is estopped from setting up powers in opposition to those expressed. *Catoir v. Insurance Co.*, 33 N. J. L. 487; 66 N. Y. 274-280. See *May on Insurance*, sec. 188; *Kyte v. Assurance Co.*, 144 Mass. 46; *Hale v. Insurance Co.*, 6 Gray, 169; *Worcester v. Insurance Co.*, 11 Cush. 265. A waiver even in writing by the agent on his books is held not binding. *Walsh v. Insurance Co.*, 78 N. Y. 5. Questions which are left unanswered by an applicant are waived by the underwriter. *Insurance Co. v. McCulloch*, 31 Q. S. 174.

CHAPTER 49.

INSURANCE—LIFE.

Sec. 717. Parties.

- 718. Actions on life insurance policy.
- 719. Petition on mutual protective policy.
- 720. Petition on mutual benefit policy.
- 721. Petition by administrator or executor on policy insuring decedent.
- 722. Petition by widow on life insurance policy of husband.

Sec. 723. Defenses to action on life insurance policy.

- 724. Answer that death was caused by unlawful act.
- 725. Answer of failure to pay premiums.
- 726. Answer that insured made false answers to interrogatories as to condition of his health.

Sec. 717. Parties.—Where the beneficiaries named in a policy die before the assured, the policy reverts to the latter and becomes subject to administration, upon which suit must be brought by an administrator.¹ If it be payable to the assured, his executors, administrators and assigns, for the benefit of third persons, suit should also be brought by the personal representative.² A person who has obtained valid insurance upon his own life may dispose of it to whom he pleases, in the absence of prohibitory legislation or contract stipulation, even though the assignee has no insurable interest.³ One not a party to a policy cannot seek to rescind or avoid it, nor to recover back premiums paid thereon, although he may have effected the policy.⁴

Sec. 718. Actions on life insurance policy.—Under the code the heirs or legal representative of any member or policy-holder may prosecute an insurance company for losses

¹ Ryan v. Rothweiler, 50 O. S. 595.

² Greenfield v. Insurance Co., 47 N. Y. 480; Tripp v. Insurance Co., 55 Vt. 100.

Eckel v. Renner, 41 O. S. 283;

Valton v. Insurance Co., 20 N. Y. 82.

⁴ Insurance Co. v. Wright, 83 O. S. 534; Insurance Co. v. Wilson, 111 Mass. 542.

which occur on any risk, if payment be withheld more than two months after the same become due.¹ The contract between the parties must be considered and construed as an ordinary contract.² To set forth a cause of action upon a policy of life insurance, the petition should contain a statement of the contract, the death of the assured, and failure to pay as agreed; an allegation that the death of the assured was not caused by the breaking of any conditions of the policy is not necessary, and does not require proof; nor is the plaintiff bound to anticipate the defense which the defendant may set up.³ But where the plaintiff relies upon the provisions of a statute of a state where the defendant company was organized, to avoid the effect of a forfeiture for non-payment of premiums, he must aver facts bringing his case within such provisions.⁴ Where a policy is void by reason of unintentional misrepresentations, an action will lie to recover premiums paid thereon.⁵ Where a company refuses to receive premiums on the ground that the policy has lapsed for non-payment of the premiums at the time stipulated, the assured may go into a court of equity to have the rights under the policy determined, and compel the company to receive the premiums thereon.⁶ The beneficiary of a policy may ask to have a mistake as to age corrected where there was no fraud, and maintain an action to recover on the policy as corrected.⁷ In an action upon a certificate of membership of a mutual insurance company which entitles the beneficiary to so much as may be realized from one assessment, the petition need not aver the number of members of the company against whom assessments may be made.⁸ Other questions, such as pleading conditions, insurable interest and attaching copies, have been discussed in a former section and are equally applicable here.⁹

¹ R. S., sec. 3601.

⁵ Insurance Co. v. Pyle, 44 O. S. 19.

² Insurance Co. v. Pyle, 44 O. S. 19; McEvoy v. M. Mut. Ins. Co., 8 O. C. C. 573.

⁶ Insurance Co. v. Tullidge, 39 O. S. 240.

³ Hall v. Scottish Rite K. T. &c. Ass'n, 6 O. C. C. 141, quoting from Boone's Pleading, sec. 156.

⁷ Life Ins. Co. v. Goodale, 8 Am. Law Rec. 833.

⁸ Elkhart, etc. Relief Ass'n v. Houghton, 108 Ind. 236; Excelsior Mut. Aid Ass'n v. Riddle, 91 Ind. 84.

⁴ Scheifers v. Insurance Co., 46 O. S. 413.

⁹ Ante, secs. 57, 690.

Sec. 719. Petition on mutual protective policy.—

The plaintiff, C. S., says that the defendant, the M. V. Mutual Relief Association, is an association of persons duly incorporated under the laws of the state of Ohio, for the purpose of paying stipulated sums to the family or heirs of its members and others named in its policies.

The plaintiff further says that at the request of said defendant, A. S., the husband of said plaintiff, became insured in the second division of said association, on the — day of —, 18—; and in consideration of the sum of — dollars then paid by said A. S., and the further consideration to pay certain death and other assessments that he might be called upon to pay by said defendant company, said defendant delivered to him its written and printed agreement (a true copy of which is hereto annexed as an exhibit only), whereby it agreed and promised that after due notice and satisfactory proof of the death of said A. S., and within sixty days thereafter, it would pay to this plaintiff, the wife of said A. S., the sum of — dollars from the death fund.

In case, however, the death fund of said division at the date of such death shall be less than that sum, then, and in that case, a sum equal to the amount actually received from one death assessment upon all the members of said division at the time of such death.

That said association promised and agreed to keep and maintain, at all times, a death fund, subject to the payment of death losses, equal to the largest sum payable on the death of a member.

Plaintiff says that on the — day of —, 18—, said A. S. died, and on —, 18—, said defendant was duly notified, and satisfactory proof thereof was made to the officers of said defendant corporation.

Plaintiff says that at the date of the death of A. S., the death fund of said second division amounted at least to the sum of — dollars, and said association were bound to have said sum on hand to pay the same, and, as plaintiff avers, did have that sum on hand as a death fund from which to pay death losses; and ought, in accordance with the terms of said agreement, to have paid the said sum to the plaintiff within sixty days thereafter.

But plaintiff avers that said defendant has not paid said sum or any part thereof.

Plaintiff says that said defendant is indebted to her in the sum of — dollars, with interest thereon from —, 18—, and for which sum and costs she prays judgment.

J. & M., Plaintiff's Attorneys.

NOTE.— From *Mahoning Valley Mutual Relief Ass'n v. Seyler*, error to circuit court of Mahoning county, Ohio, No. 1495. The right to sue cannot be taken away by contract. *Council v. Garrigus*, 104 Ind. 188; *Bauer v. Samson Lodge*, 102 Ind. 262; *Supreme Council v. Forsinger*, 125 Ind. 52.

Sec. 720. Petition on mutual benefit policy.—

Plaintiff says that defendant is a corporation created and existing under the laws of the state of Illinois, and doing business and having a place of business in the state of Ohio. That on the — day of —, 18—, the defendant in consideration of the payment of the usual membership fee, and agreement to pay an annual expense assessment and such mortuary assessments as may be levied, issued to one J. O. a certificate of membership, being No. —, a copy of which certificate is hereto annexed and marked "Exhibit A," upon the terms of which certificate defendant promised and agreed to pay to plaintiff herein, in case of death of said J. O., all that shall have been collected from one assessment upon the members of said association, after first making provision for the guaranty fund, provided that such indemnity fund so to be paid shall in no event exceed the sum of — dollars, and to pay said sum of money — days from the receipt of satisfactory proofs of death. That on the — day of —, 18—, at B., Pa., the said J. O. died; that proofs of death were furnished on or about —, 18—.

Plaintiff further says that plaintiff and said J. O. had each performed all the conditions of said certificate on their part to be performed; that defendant, although requested, has not paid said sum of money nor any part thereof.

Wherefore plaintiff prays judgment against said defendant in the sum of — dollars.

H. L. B., Attorney for Plaintiff.

NOTE.—From *Total Abstinence Life Ass'n of America v. O'Harra*, Supreme Court, unreported, No. 3357.

Sec. 721. Petition by administrator or executor on policy insuring decedent.—

[Caption.]

1. [*Averment of corporate character of company.*]

2. [*Averment of appointment of administrator or executor.*]

That on the — day of —, 18—, in consideration of the sum of \$— then paid by plaintiff's decedent to defendant, and of the further agreement by said decedent to pay to said defendant company the sum of \$— as an annual premium, said defendant company did execute and deliver to the said decedent its certain policy of insurance upon his life (a copy of which is hereto attached as an exhibit only), said defendant thereby contracting to insure the life of said decedent in the sum of \$—, and thereby agreed to pay to the estate of said A. B., deceased, the sum of \$—. [*Here state such terms of policy as seem essential.*]

That on the — day of —, 18—, the said A. B. died from — [*state cause of death*], and not within any of the causes excepted in and by the terms of said policy, by which

it was provided it would not pay a death loss in case death resulted therefrom.

That the said A. B., during his life-time, fully and completely complied with all the terms and conditions of said policy of insurance, and this plaintiff, as his legal representative, has likewise complied with all conditions to be by him performed, and has made proof of the death of the said A. B., deceased, in accordance with the terms of said policy.

There is therefore due and owing this plaintiff, as such administrator, upon said policy of insurance, the sum of \$—, for which he asks judgment.

Sec. 722. Petition by widow on life insurance policy of husband.—

[Averment of corporate capacity.]

Plaintiff states that she is the widow of A. B., late of the city of C., county of —, Ohio, who died at C. on the — day of —, 18—.

That during the life-time of her said husband he entered into a contract, to wit, on the — day of —, 18—, with the defendant company, by which, in consideration of the sum of \$— then by her said husband, A. B., paid to said defendant company as a first premium, and of the further agreement on the part of her said husband, A. B., that he would pay to said defendant the sum of \$— each and every year as an annual premium so long as said contract should remain in force, said defendant company thereupon, by its written contract of insurance, duly executed and delivered to said A. B. upon the date aforesaid, did agree and contract by its policy of insurance, a copy of which is annexed hereto as an exhibit only, to insure the life of said A. B. in the sum of \$—, the loss payable upon the death of said A. B. to this plaintiff as his widow. *[Here may be stated any terms of policy deemed essential.]*

That as before stated said A. B. died on the — day of —, 18—, and that he did during his life-time punctually pay all premiums upon said policy and perform all and singular the conditions of said policy to be by him kept and performed, and that plaintiff as his widow complied with all conditions and requirements thereof, so far as were required of her, and did on the — day of —, 18—, duly notify said defendant company of the death of her said husband, presenting said company with proofs thereof, as required by said policy of insurance.

That plaintiff as such widow has demanded payment of the amount due her upon said policy of insurance from said company, which it has failed and refused to pay and still refuses so to do.

There is therefore due said plaintiff from said defendant upon said policy of insurance the sum of \$—, for which she asks judgment.

Sec. 723. Defenses to actions on life insurance policies.—

Non-payment of premiums at the appointed time,¹ misrepresentation made by the assured as to age² or as to other insurance,³ or fraud,⁴ or as to the use of intoxicating liquors,⁵ will avoid the policy and discharge the insurer. But the denial of having a certain disease will not be such misrepresentation as will invalidate a policy unless there were such symptoms as would reasonably indicate the disease.⁶ Nor will a wife be barred of her right of action on a policy which is her exclusive property, by the fraud or misrepresentation of her husband.⁷ But by statute in Ohio companies are estopped, after having received three annual premiums on a policy, from defending upon any ground other than fraud; they cannot urge any error, omission or misstatement of the assured excepting as to age.⁸ A policy issued upon answers and statements warranted to be true, but which are in fact false, though unintentionally so, is nevertheless void.⁹ If a company fails to give the accustomed notice of the time when the premium falls due, it cannot urge the non-payment of the premium as a defense to an action therein.¹⁰ Suicide may be a defense, but the *onus* is upon the company to show that death was within such a proviso of the policy.¹¹ If insanity be relied on to meet the defense of suicide it must be specially pleaded.¹² When a defense made by a mutual aid society that the class to which the assured belonged was not filled at the time of his death, and that certain assessments have not been paid, is controverted by reply, it must be affirmatively proven by the defendant.¹³ Under a general denial a defendant cannot show that death resulted from intentional injury.¹⁴

¹ Robert v. Insurance Co., 1 Disn. 355.

⁸ R. S., sec. 3626. See Lowe v. Insurance Co., 41 O. S. 273.

² Low v. Insurance Co., 10 Am. Law Rec. 313.

⁹ Insurance Co. v. Pyle, 44 O. S. 12.

³ Penniston v. Insurance Co., 4 W. L. B. 935.

¹⁰ Insurance Co. v. Smith, 44 O. S. 156.

⁴ Insurance Co. v. Sandal, 3 W. L. B. 559.

¹¹ Schultz v. Insurance Co., 42 O. S. 217.

⁵ Insurance Co. v. Holterhoff, 2 C. S. C. R. 379.

¹² Schultz v. Insurance Co., 4 W. L. B. 843.

⁶ Insurance Co. v. Reif, 1 W. L. B. 390.

¹³ Hall v. Aid Association, 6 O. C. C. 137; Boone's Pleadings, sec. 156.

⁷ Insurance Co. v. Applegate, 7 O. S. 292.

¹⁴ Coburn v. Insurance Co., 145 Mass. 226.

A company after having recognized a beneficiary for a number of years cannot be permitted to deny his right to sue on a policy.¹ And so will a company which receives payments on policies after the time at which they fall due be estopped from claiming forfeiture by reason of non-payment;² and the company is bound by representations made by their duly authorized agents within the scope of their authority.³ Where the defense in an action on a life policy is that the policy had lapsed for non-payment of premiums, and that the assured had procured it to be reinstated by representations as to his health which he knew at the time were false, defendant must prove that the assured knew such representations to be false.⁴

Sec. 724. Answer that death was caused by unlawful act.

[*Caption and formal averments.*]

That it is provided in the policy of insurance sued on that if the assured should die by reason of his violation of the laws of any of the states or of the United States, then the policy should be null and void.

That said assured came to his death as follows: [*State facts showing violation of law and cause of death.*]

Sec. 725. Answer of a failure to pay premiums.—

[*Caption and formal averments.*]

That it is provided in said policy sued on that it is given in consideration of the semi-annual premium of — dollars, to be paid before noon on the — day of —, 18—, and —, 18—, and that upon a failure to pay any of said semi-annual instalments on or before the days mentioned, said policy should cease and determine, and all rights under said policy should be forfeited.

That the instalment of said premium notes falling due on the — day of —, 18—, was not paid on or before it fell due [but was still unpaid at the time of the death of the insured].

Sec. 726. Answer that insured made false answer to interrogatories as to condition of his health.—

Defendant says that the application of the said J. O. to this defendant, upon which said certificate and policy sued on was issued, in answer to interrogatories therein contained the said

¹ Insurance Co. v. Hamilton, 41 O. S. 274.

² Insurance Co. v. Wright, 33 O. S. 533.

³ Insurance Co. v. Tullidge, 39 O. S. 244; Insurance Co. v. Doster, 106 U. S. 30; Insurance Co. v. Rudwig,

⁴ Patten v. U. Life Ins. Ass'n, 24 N. Y. S. 269 (1898).

11 Ins. Law J. 603.

J. O. stated that at the time said application was made he was in good health; that he had not then and never had had any lung difficulty; that none of his brothers or sisters, father or mother had died of consumption or any disease of the lungs. He also in said application stated that he had never been rejected by any insurance company.

At the time said statements were made they were all and each of them false and untrue, and were known to be so by the said J. O. at the time he made them; and they were made by the said J. O. for the purpose of defrauding this defendant.

Two sisters of said J. O. died of lung disease. At the time said application was made the said J. O. had consumption, and he knew it; of which disease he died at the time alleged in the petition. He had made application to an insurance company and been rejected but a short time before he made the application upon which this policy was issued for the reason that he had disease of the lungs. Said statements were the basis upon which said policy was issued, and this defendant is not liable upon said certificate and policy, and prays to be discharged and recover its costs herein.

J. H. N., Attorney for Defendant.

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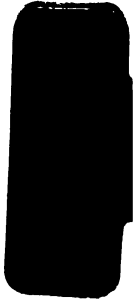
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